

# Communism's Challenge and the Constitution

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# COMMUNISM'S CHALLENGE AND THE CONSTITUTION\*

MURRAY COHEN AND ROBERT F. FUCHS

## Introduction

A spectre is haunting America—"the spectre of communism,"<sup>1</sup> and fear of it has precipitated a demand for prophylactic action. But any restraint on those here who seek to make that spectre a reality can be justified only if our democracy, which is committed to the protection of wrong as well as right ideas, must act in self-defense.

The appeal of communism emanates from international ideological attractions of world peace and social reform.<sup>2</sup> Its threat lies in the use of that idealism to cajole the allegiance of Americans to a foreign power.<sup>3</sup> Thus, the problem of communism transcends the traditional legislative technique employed by a sovereign in a world of nation states.<sup>4</sup>

Since, to be effective, efforts to control Russian communism in the United States may necessitate control of such disaffected Americans,<sup>5</sup> the advocacy of such restraints requires a shift in attitude toward civil liberties. Testing the desirability of this shift poses the fundamental dilemma: "Must a government of necessity be too strong for the liberties of its

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\*This is the first of two instalments. The second will appear in the Spring 1949 issue of the *QUARTERLY*. The relevant provisions of the Mundt-Nixon Bill discussed in this article will be found in the appendix to this instalment.

<sup>1</sup>THE COMMUNIST MANIFESTO OF MARX AND ENGELS (D. Ryazanoff) (1847).

<sup>2</sup>This appeal reaches Americans of different social strata. As affecting intellectuals see Warshaw, *Middle Class Mass Culture and the Intellectual's Problem*, Commentary, Dec. 1947, p. 538. "But in this country there was a time when virtually all intellectual vitality was derived in one way or another from the Communist Party." As affecting immigrants of the lower economic classes see Barnes, *The Foreign Policy of the American Communist Party*, Foreign Affairs, April 1948, pp. 421, 429.

<sup>3</sup>REPORT OF THE ROYAL COMMISSION APPOINTED TO INVESTIGATE THE FACTS RELATING TO THE COMMUNICATION BY PUBLIC OFFICIALS OF SECRET INFORMATION TO AGENTS OF A FOREIGN POWER 57 (1946), hereinafter referred to as the CANADIAN REPORT. "Perhaps the most startling single aspect of the entire Fifth Column network is the uncanny success with which the Soviet agents were able to find Canadians who were willing to betray their country." Surprisingly, the American Communist Party has not exhibited any of the tendencies toward nationalism which presently characterized most other communist parties. The shift has rather been from theoretical communism toward a completely pro-Soviet attitude. Barnes, *The Foreign Policy of the American Communist Party*, Foreign Affairs, April 1948, p. 429; Moore, *The Communist Party of the U. S. A.—An Analysis of a Social Movement*, 39 AM. POL. SCI. REV. 31, 34 (1945).

<sup>4</sup>"The United States has blundered and stumbled, seeking to apply Anglo-Saxon jurisprudence to a situation not controlled by the Magna Charta, the Bill of Rights, or the statute books." Newsweek, May 10, 1948, p. 21, col. 3; Att'y Gen. Clark, *Statement before House Committee on Un-American Activities*, 80th Cong., 2d Sess. 8-12 (1948); cf. Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Suppression*, 37 ILL. L. REV. 193 (1942).

<sup>5</sup>E.g., CHAMBER OF COMMERCE, COMMUNIST INFILTRATION IN THE UNITED STATES (1946); Eastman, *Stalin's American Power*, Reader's Digest, Dec. 1941, p. 39. But see Knepper, *Should We Outlaw the Communist Party?*, Forum, June 1947, p. 497.

people, or too weak to maintain its own existence?"<sup>6</sup> This dilemma requires that legislation, while adequately curbing communism, must hold to a minimum the dangers of infringing civil liberties.

This article, then, will attempt, in light of this test, to evaluate past proposals and to suggest alternate methods of dealing with the problem of communism. However, it must be remembered that emphasis on the techniques of legislation risks the masking of the basic problem—the authenticity of the factual premises on which such legislation is based.

### *Assumptions of Fact*

There are many divergent views as to the degree to which domestic communism endangers our national security, and these varying opinions cannot be correlated mechanically with the political and economic ideologies of their advocates. Both because of the broad compass of the subject matter and the difficulty of achieving a *tabula rasa*, it was found unfeasible to attempt a gathering and evaluation of facts to determine the relative merits of these conflicting positions. Emphasis, rather, has been placed on the methods of dealing with the challenge of communism. Therefore, we have assumed the following premises which, while reasonable,<sup>7</sup> do characterize that challenge as highly dangerous and deleterious to our welfare:

1. The Communist Party of the United States, as it now exists, is not only a political party but also an agency for the domestic attainment of the ideologies, objectives, and supremacy of a foreign power.<sup>8</sup>
2. The establishment of that foreign power's supremacy in any country results in the complete subordination of individual to

<sup>6</sup>See Mr. Justice Frankfurter, quoting President Lincoln, in *Minersville School Dist. v. Gobitis*, 310 U. S. 586, 596, 60 Sup. Ct. 1010, 1013 (1940); H. R. REP. No. 1844, 80th Cong., 2d Sess. 4 (1948); Cushman, *National Defense and the Retention of Civil Liberties*, 9 KAN. CITY L. REV. 63 (1941).

<sup>7</sup>Although a reviewing tribunal might reach a different conclusion *de novo*, it is submitted that there is substantial evidence to enable a reasonable and impartial man to make the assumptions herein set forth.

<sup>8</sup>E.g., H. R. REP. No. 1844, 80th Cong., 2d Sess. 2, 3 (1948); H. R. REP. No. 209, 80th Cong., 1st Sess. (1947); William C. Bullitt, *Hearings before the House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 4, 5 (1947); Gouzenko, CANADIAN REPORT 29 (1946). But cf. DRAFT RESOLUTION FOR THE NATIONAL CONVENTION, C. P. U. S. A., Political Affairs, June 1948, p. 509.

As to the continuous secret existence of the Communist International even after publicly announced dissolution on May 15 and June 16, 1943, see CANADIAN REPORT 37-41 (1946); Victor A. Kravchenko, *Hearings before House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 18-19 (1947); cf. George Hewett (former member of the Nat'l Committee of the Communist Party), N. Y. Times, Feb. 20, 1948, p. 9, col. 2. The Cominform seemingly has now taken over its functions.

As to the almost complete correlation through the years between the Communist Party line and the interest of the Soviet Union see, e.g., Davenport, *Trouble in Paradise*, Colliers, Aug. 10, 1946, p. 145; Goldbloom, *American Communism, Party of the Right*, Common Sense, September 1944, p. 305; Ross, *It's Tough to be a Communist*, Harper's Mag., June 1946, p. 528.

state, in the denial of liberties characteristic of a representative form of government, and in the maintenance of control through fear and coercion.<sup>9</sup>

3. The communists, apparently committed to these ethical values and believing that ends justify means,<sup>10</sup> would at the opportune time overthrow by force and violence our political and economic structure.<sup>11</sup>

4. There exists in this country a Fifth Column, engaged in espionage<sup>12</sup> and propaganda,<sup>13</sup> organized and directed by foreign agents within the United States.<sup>14</sup>

5. The Communist Party in this country is the principal recruiting base for this Fifth Column; it not only supplies personnel with adequately "developed" motivation, but provides the organizational framework within which recruiting is carried out safely and efficiently.<sup>15</sup>

6. Although the American Communist Party has relatively few enrolled members,<sup>16</sup> its singleness of purpose, central control of ac-

<sup>9</sup>E.g., H. R. 5852, 80th Cong., 2d Sess. § 2 (2) (1948), hereinafter called the MUNDT-NIXON BILL; HOUSE DOC. NO. 754, 79th Cong., 2d Sess. (1946); CHAMBER OF COMMERCE, COMMUNIST INFILTRATION IN THE UNITED STATES 708 (1946). For a description of communist impact on other countries, see Van Dyke, *Position and Prospects of the Communists in France*, 63 POL. SCI. Q. 45 (1948); Steed, Duff, and Soloveyitchik, *Darkness over Czechoslovakia*, Contemporary, April 1948, p. 193; cf. Alexander, *Decline of Latin American Communist Parties*, Modern Review, Mar.-Apr. 1948, p. 220.

<sup>10</sup>Barnes, *The Foreign Policy of the American Communist Party*, 26 FOREIGN AFFAIRS 421, 426 (1948); Coyle, *Tolerance and Treason*, 37 YALE REVIEW 411-13 (1948).

<sup>11</sup>E.g., H. R. REP. NO. 209, 80th Cong., 1st Sess. (1947); Moore, *The Communist Party of the U. S. A.—An Analysis of a Social Movement*, 39 AM. POL. SCI. REV. 31, 34 (1945); N. Y. Times, May 12, 1948, p. 1, col. 6.

"They [Communists] openly declare that their purposes can only be achieved by the forcible overthrow of the whole extant social order." THE COMMUNIST MANIFESTO OF MARX AND ENGELS 68 (D. Ryazanoff) (1847). But see Note, 51 YALE L. J. 1215 (1942) for the doubtful value of using such writings today. And communists have denied that they now advocate the use of force and violence. E.g., Dennis, *The Present Role of the Communist Party*, Political Affairs, March 1948, p. 207; N. Y. Times, Feb. 21, 1948, p. 6, col. 6.

<sup>12</sup>CHAMBER OF COMMERCE, COMMUNISM EXPOSED 17 (1947); Newsweek, Feb. 17, 1947, p. 29, col. 1; Bentley, N. Y. Times, July 31, 1948, p. 1, col. 5; J. E. Hoover, N. Y. Times, Feb. 7, 1947, p. 3, col. 3; cf. CANADIAN REPORT 11, 693 (1946).

For possible sabotage in case of war with Soviet Russia, see Valtin, *A B C of Sabotage*, American Mercury, Apr. 1941, p. 417.

<sup>13</sup>Moore, *The Communist Party of the U. S. A.—An Analysis of a Social Movement*, 39 AM. POL. SCI. REV. 31, 34, 35 (1945); La Follette, Jr., *Turn the Light on Communism*, Colliers, Feb. 8, 1947, pp. 22, 74; cf. CANADIAN REPORT 82 (1946). Among others, Henry Wallace is reported to have agreed that this propaganda necessitated countermeasures. Newsweek, July 8, 1946, p. 21, col. 3.

<sup>14</sup>Solow, *Stalin's American Passport Mill*, American Mercury, July 1939, p. 303; Ellis, *American Civil Rights in a Revolutionary Age*, Forum, Feb. 1948, p. 133; cf. CANADIAN REPORT 685 (1946).

<sup>15</sup>"The Communist Party of the United States is a 5th column if there ever was one." J. E. Hoover, *Hearings before the House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 43 (1947); cf. CANADIAN REPORT 44 (1946). On page 686, the CANADIAN REPORT makes the following finding of fact: "Membership in communist organizations or a sympathy towards communist ideologies was the primary force which caused these agents to agree to do the acts referred to in their individual cases."

<sup>16</sup>Estimates of membership have ranged from 74,000 to 100,000. Att'y Gen. Clark, N. Y. Times, March 28, 1948, p. 5, col. 8; J. E. Hoover, *Hearings before the House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 37 (1947). There is little evidence of any growth in membership, N. Y. Times, March 7, 1948, p. 10,

tivities, infiltration into positions of control in both public and private agencies,<sup>17</sup> operations of "front" organizations,<sup>18</sup> and aid from fellow travelers<sup>19</sup> greatly magnifies its danger to this country.<sup>20</sup>

7. International travel of representatives of the world communist program is important for purposes of communication and coordination of activities in furtherance of its objectives.<sup>21</sup>

### *Legislative Objectives*

Although many, and probably most people are in favor of some legislation to control or curb the American Communist Party, there has been little crystallization of thought on exactly what that legislation should seek to accomplish. An adequate appraisal of neither alternate techniques nor the efficacy of any particular bill can be made unless specific legislative objectives have been framed.

Certain legislative goals can be formulated from our prior assumptions, from the history of proposed federal bills<sup>22</sup> and from the general

col. 1, and there is some prediction that party membership will decline in 1948. Prof. L. Hacker, N. Y. Times, April 15, 1948, p. 42, col. 8.

<sup>17</sup>*Labor: Hearings before the House Committee on Un-American Activities Regarding Communism in Labor Unions in the United States*, 80th Cong., 1st Sess. (1947); CHAMBER OF COMMERCE, COMMUNISTS WITHIN THE LABOR MOVEMENT (1947); Patch, *Communism in America*, Editorial Research Report, Nov. 13, 1946, pp. 794-98.

*Government: CHAMBER OF COMMERCE, COMMUNISTS WITHIN THE GOVERNMENT* (1947); La Follette, Jr., *Turn the Light on Communism*, Colliers, Feb. 8, 1947, p. 22, col. 3; Bentley, N. Y. Times, July 31, 1948, p. 1, col. 5.

*General: CHAMBER OF COMMERCE, COMMUNIST INFILTRATION IN THE UNITED STATES* (1946); Franklin, *Why I Broke with the Communists*, Harper's Mag., May 1947, p. 412.

<sup>18</sup>MUNDT-NIXON BILL § 2 (7); H. R. REP. NO. 271, 80th Cong., 1st Sess. 10-13 (1947) (American Youth for Democracy); CHICAGO JOURNAL OF COMMERCE, THE COMMUNIST FIFTH COLUMN (1946); Lyons, *It Was Smart To Be Red*, Sat. Eve. Post, Dec. 9, 1939, p. 25. For factors testing whether an organization is a communist front, compare MUNDT-NIXON BILL § 3 (4), with J. E. Hoover, *Hearings before the House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 42 (1947).

<sup>19</sup>"What is important is the claim of the Communists themselves that for every party members there are ten others ready, willing, and able to do the party's work." J. E. Hoover, *Hearings before the House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 37 (1947). See Daily Worker, Aug. 25, 1937, p. 2. For a test of who is a fellow traveler see CHAMBER OF COMMERCE, COMMUNISTS WITHIN THE GOVERNMENT 32-33 (1947); Att'y Gen. Clark, *How to Fight Communism*, Newsweek, June 9, 1947, p. 30, col. 3.

<sup>20</sup>A clear and present danger: MUNDT-NIXON BILL § 2 (11); H. R. REP. NO. 1844, 80th Cong., 1st Sess. 2 (1948); Ellis, *American Civil Rights in a Revolutionary Age*, Forum, April 1948, pp. 193, 197. But cf. Life, June 14, 1948, p. 20, col. 2; N. Y. Times, May 23, 1948, p. 20, col. 2; N. Y. Times, May 23, 1948, § 4, p. 7, col. 1.

*In case of conflict with the Soviet Union: J. E. Hoover, Hearings before House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 37 (1947). For an example of self-incriminating ambiguity on this score, see William Z. Foster, N. Y. Times, May 30, 1948, p. 28, col. 3.

<sup>21</sup>MUNDT-NIXON BILL § 2 (8). "An American passport mill is almost indispensable in any [communist] espionage set-up." Solow, *Stalin's American Passport Mill*, American Mercury, July 1939, p. 303.

<sup>22</sup>Due to comparatively little Senate action, almost all of the legislative history relating to bills attempting to curb or control the Communist Party is found in discussions in the House of Representatives. The explanation seems to be traceable to the Senate's lesser enthusiasm for communist controls and the lack of a standing committee on subversive activities in that body.

objectives of the proponents of anti-communist legislation. These are:<sup>23</sup>

1. To sever the umbilical cord between American communism and world communism by restricting the travel of communists from or to the United States;<sup>24</sup>

2. To take additional security measures to prevent communist infiltration into positions of federal employment, or at least those positions which involve trust or influence;<sup>25</sup>

3. To prevent communists from gaining support, financial or otherwise, from those who would withdraw their aid if the true nature and purposes of the supported organizations were disclosed;<sup>26</sup>

4. To take such measures as will enable consumers of communist propaganda<sup>27</sup> to become cognizant of its origin;<sup>28</sup>

5. To acquire such information as will enable the Government to know the identity and whereabouts of all those whose "allegiance" is to the Communist Party;<sup>29</sup>

6. To make criminal those activities which have as their purpose the setting up in the United States of a totalitarian government under foreign control;<sup>30</sup>

7. To deny the communists the use of the ordinary means of the democratic process,<sup>31</sup> and the privileges of American citizen-

<sup>23</sup>The following objectives were arranged numerically, proceeding from the least objectionable, in the light of their impact on civil liberties.

<sup>24</sup>MUNDT-NIXON BILL § 7; H. R. REP. NO. 1844, 80th Cong., 2d Sess. 5 (1948); Rep. Mundt, 94 Cong. Rec. 5996 (May 14, 1948); Rep. Nixon, N. Y. Times, April 10, 1948, p. 1, col. 2.

<sup>25</sup>H. R. REP. NO. 1844, 80th Cong., 2d Sess. 5 (1948); CHAMBER OF COMMERCE, COMMUNISTS WITHIN THE GOVERNMENT 27-37 (1947); Sat. Eve. Post, Jan. 22, 1944, p. 92, col. 3; cf. Exec. Order No. 9835, 12 FED. REG. 1935 (1947); cf. CANADIAN REPORT 689 (1946).

<sup>26</sup>MUNDT-NIXON BILL § 2 (7); Rep. Lucas, 94 Cong. Rec. 6270, 6271 (May 19, 1948); N. Y. Times, April 10, 1948, p. 1, col. 2.

<sup>27</sup>The modern and subtle technique of propaganda has led to demand for such action. Besides producing propaganda relating to American and Soviet foreign policy, an important factor in communist appeal has been the propaganda program urging adoption of domestic "social reforms." As such reforms appeal to a large segment of the American population, this propaganda serves not only as a recruiting device, but also, by associating such domestic propaganda with the propaganda of a foreign state, serves to "carry" by implication that state's propaganda. A commercial example of this non-rational but effective technique is the use of a pretty girl in cigarette advertisements. CANADIAN REPORT 82 (1946); cf. J. E. Hoover, *Hearings before the House Committee on Un-American Activities on H. R. 1884 and H. R. 2122*, 80th Cong., 1st Sess. 37 (1947).

<sup>28</sup>See Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure*, 10 U. OF CHI. L. REV. 107, 108 (1943); cf. Smith, *Subversive Propaganda, The Past and the Present*, 29 GEO. L. J. 809, 825 (1941); Sen. Taft, *How Should Democracy Deal with Groups Which Aim to Destroy Democracy?*, Town Meeting, May 18, 1948, p. 7.

<sup>29</sup>MUNDT-NIXON BILL § 8 (d) (4); Rep. Mundt, 94 Cong. Rec. 5995 (May 14, 1948); CHAMBER OF COMMERCE, COMMUNISM EXPOSED 21 (1947); Sen. Bridges, *American Foreign Policy and Communism*, Vital Speeches, April 15, 1948, pp. 391, 393; cf. New Yorker, June 12, 1948, p. 17. This information would be especially valuable in case of conflict with the Soviet Union.

<sup>30</sup>H. R. REP. NO. 1844, 80th Cong., 2d Sess. 1-5 (1948); Stassen, N. Y. Times, April 3, 1948, p. 13, cols. 1, 2; MUNDT-NIXON BILL § 4; H. R. 4581, 80th Cong., 1st Sess. (1947) (defined communism as treasonable); H. R. 2122, 80th Cong., 1st Sess. (1947).

<sup>31</sup>H. R. 5615, 80th Cong., 2d Sess. (1948); H. R. 4482, 80th Cong., 1st Sess. (1947); Sat. Eve. Post, Dec. 9, 1939, p. 24; *Dewey and Stassen Debate*, Vital Speeches, June 1, 1948, pp. 482, 484. But cf. Paulding, *100,000 Communists*, Commonweal, April 11, 1947, p. 631.

ship<sup>32</sup> or domicile.<sup>33</sup>

Although the Mundt-Nixon Bill was not passed by the 80th Congress, and its ultimate fate is unknown at the present time, the following discussion will be focused on its terms; the Bill will probably serve as the point of departure if further attempts to control the communist movement are initiated in the future; but whether or not future legislation to control the communists parallels the Bill, the constitutional problems raised by it and discussed here will also be raised by any legislation to control minority political groups.

### I. Restricting Communist Travel<sup>34</sup>

Since this objective is merely to cut communist communication lines, we have limited our discussion to regulation and prevention of communist travel by controlling issue and use of visas and passports.<sup>35</sup>

The fact that the only significant criminal convictions<sup>36</sup> of communists in the United States have revolved about visas and passports attests to the importance communists attach to their possession. Though other means of communication are available, the secrecy and vast scope of the world communist movement make personal contact imperative for determining policies in various nations.<sup>37</sup> Further, passport control may prevent Americans from securing the traditional indoctrination given most non-Russian communist leaders.<sup>38</sup> As international travel

<sup>32</sup>MUNDT-NIXON BILL § 5; cf. Sat. Eve. Post, Dec. 9, 1939, p. 24, col. 1.

<sup>33</sup>Att'y Gen. Clark, *Statement before House Committee on Un-American Activities*, 80th Cong., 2d Sess. 13 (1948); N. Y. Times, Jan. 22, 1948, p. 28, col. 2.

<sup>34</sup>Since this article proceeds in terms of legislative objectives, its structure cannot follow that of an actual statute. The following overlapping problems will be dealt with under the objectives deemed to be most suitable:

- 1) Clear and present danger rule is discussed under *Criminal Sanctions*.
- 2) Guilt by association is discussed under *Criminal Sanctions*.
- 3) Defining a communist front organization is discussed under *Communist Front Organizations*.
- 4) Defining a communist political organization is discussed under *Communist Political Organizations*.
- 5) Who is a member of an organization is discussed under *Communist Political Organizations*.
- 6) Administrative procedure and judicial review are discussed under *Communist Political Organizations*.

For a brief discussion of the whole Bill see Wheeldon, *The Mundt-Nixon Bill*, Editorial Research Report, Feb. 11, 1948, pp. 91, 116.

<sup>35</sup>The curbing of communism through immigration and deportation policies is applicable here only as relevant to the actual stratagem of severing communication. Such policies will be discussed under the last legislative objective, denaturalization and deportation.

<sup>36</sup>*Browder v. United States*, 312 U. S. 335, 61 Sup. Ct. 599 (1941); Gerhardt Eisler, N. Y. Times, Oct. 31, 1948, p. 3, cols. 5, 7.

<sup>37</sup>Though there are other methods of severing communication besides denying physical access to or from the United States, such as censorship and public ownership of all short-wave transmitters, it was felt that these extreme measures would not be considered.

<sup>38</sup>Solow, *Stalin's American Passport Mill*, American Mercury, July 1939, p. 303; cf. MUNDT-NIXON BILL § 3 (3) (f). Moreover, our loose passport control has made it possible for foreign communists—relying on our polyglot population—to use forged American passports throughout the world without exciting suspicion. Solow, *id.* at 303.

without visas and passports is virtually impossible,<sup>39</sup> their effective control prevents communist travel.

Because civil rights are not absolute but are relative to the legitimate interests of government, in passing on the desirability of this legislative objective, reference must be made to the traditional spheres of control which have been delegated to a representative form of government. Though rigid control of passports was "once a sure index to the character of a nation's government," as it flourished only in the police state,<sup>40</sup> control of foreign travel has always been recognized as a sovereign function;<sup>41</sup> refusal of the privilege of travel to persons with radical tendencies has now become commonplace.<sup>42</sup> The first United States statute to reflect this tendency was the War Service Passport Act of 1918,<sup>43</sup> which gave the president power to prescribe limitations on travel for both aliens and citizens. Judicial interpretation has given the Secretary of State, the diplomatic staff, and the consular service—all of whom act under the president's authority—absolute discretion over the issuance and revocation of passports and visas.<sup>44</sup>

Although the sovereign has absolute power to prohibit foreign intercourse, it has been held that an expressed arbitrary reason given by an individual officer for denying such travel may be attacked.<sup>45</sup> And it would seem that a discriminating statute which was found to be arbitrary would fall afoul of the Fifth Amendment.<sup>46</sup> But to make a blanket refusal of visas or passports to either aliens or citizens acting in behalf of a foreign government would seem clearly related to legitimate objectives.<sup>47</sup>

<sup>39</sup>40 STAT. 559 (1918), 22 U. S. C. § 224 (1946); 40 STAT. 227, 22 U. S. C. § 221 (1946). Issuance of American passports is now carefully regulated. N. Y. Times, April 27, 1941, § 7, p. 21.

<sup>40</sup>Hildred, *Very Suspicious Characters*, Sat. Eve. Post, Dec. 7, 1946, p. 73.

<sup>41</sup>See *Rex v. Brailsford*, [1905] 2 K. B. 730, 745; *Benish's Case*, U. S. FOREIGN REL.: 1893 at 3, 24 (Dep't State 1896).

<sup>42</sup>Hildred, *Very Suspicious Characters*, Sat. Eve. Post, Dec. 7, 1946, p. 17.

<sup>43</sup>40 STAT. 559 (1918), 22 U. S. C. § 223 (1940), as amended, 41 STAT. 1205, 1217 (1921), 22 U. S. C. § 227 (1946). Subsequent to the First World War, this power was not utilized by the President until he required by executive order of Jan. 12, 1927 that all aliens, as a condition of entry, present a passport duly visaed by a consular officer of the United States and further authorized the Secretary of State and the Secretary of Labor (who was then in charge of immigration) to make additional rules and regulations. Exec. Order No. 4125, 22 CODE FED. REGS. § 33.1 (1939).

<sup>44</sup>*United States ex rel. London v. Phelps*, 22 F. 2d 288 (C. C. A. 2d 1927); *United States ex rel. Johanson v. Phelps*, 14 F. 2d 679 (D. Vt. 1926); 23 OPS. ATT'Y GEN. 509 (1901). For an extreme example see *United States ex rel. Strachey v. Reimer*, 101 F. 2d 267 (C. C. A. 2d 1939), 52 HARV. L. REV. 833 (revocation of visa by consul after commencement of travel). But see *Strachey*, *The Law of the Strachey Case*, New Republic, Nov. 9, 1938, p. 11.

<sup>45</sup>*Perkins v. Elg*, 307 U. S. 325, 59 Sup. Ct. 884 (1939); see *U. S. v. Karnuth*, 29 F. 2d 314, 316 (W. D. N. Y. 1928).

<sup>46</sup>See note 68 *infra*. However, because of the Federal Government's power over foreign relations, the court may refuse to entertain jurisdiction where it might raise a political question. See notes 159-60 *infra*.

<sup>47</sup>See Note, *Conduct Proscribed as Promoting Violent Overthrow of the Government*,



Though the receipt of a passport or a visa is a privilege accorded by the sovereign, a condition cannot be placed on its issuance which violates the First Amendment.<sup>48</sup> True, the refusal of foreign travel to communists will, to some extent, deter freedom of expression by putting a premium on disassociation from communist tenets. But if the court finds that the substantive evils sought to be avoided by the statute do in fact exist and that on the basis of a value judgment they outweigh the infringement on the First Amendment, the legislation will be upheld,<sup>49</sup> even though it might encroach on the policy expressed by that Amendment.<sup>50</sup> The slight indirect deterrent on the freedom of speech of those<sup>51</sup> who seek to further the world communist movement by use of the privilege of travel to and from the United States would not seem to outweigh the taking of an effective step to prohibit such travel.<sup>52</sup> Since almost all conceivable objections were raised against the Mundt-Nixon Bill in the House, the complete lack of debate on this legislative objective would seem to support the validity of the above judgment.<sup>53</sup>

In light of the communist need to travel, and the importance of our taking adequate prophylactic measures, criminal sanctions to enforce a prohibition against travel would seem desirable.

In attaching criminal penalties to a communist's passport application, §§ 7 (a) and 15 (c) of the Mundt-Nixon Bill remove a traditional discretion vested in the executive, a discretion which it may be advisable to retain for special circumstances in the future. But as one of the purposes of this section is to limit the liberal use of discretionary power by executive employees, such special action should result only by a presidential executive order. To retain executive discretion, the Mundt-Nixon Bill's criminal sanctions must be shifted from the mere making

61 HARV. L. REV. 1215 (1948); 54 HARV. L. REV. 155 (1940). But see Feinglass v. Reinecke, 48 F. Supp. 438, 439 (N. D. Ill. 1942).

<sup>48</sup>See Merrill, *Unconstitutional Conditions*, 77 U. OF PA. L. REV. 879 (1929); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COL. L. REV. 321 (1935).

<sup>49</sup>See discussion of clear and present danger under the objective, *Criminal Sanctions*. If possession of an issued passport were considered a property right, a due process problem would arise in its revocation; however, even then the exercise of such revocation probably would be reasonable.

<sup>50</sup>CHAFEE, *FREEDOM OF SPEECH* 284 (1920).

<sup>51</sup>However, as Professor Chafee points out, freedom of speech should not be thought of merely as an individual right, for the community as a whole has to some extent a social interest in having an opportunity to receive each individual's views. CHAFEE, *FREEDOM OF SPEECH* 282 (1920); see Marsh v. Alabama, 326 U. S. 501, 66 Sup. Ct. 276 (1946); Note, *Inseparability in Application of Statutes Impairing Civil Liberties*, 61 HARV. L. REV. 1208 (1948).

<sup>52</sup>It may well be that "to democrats they [passport measures] are a storm warning . . . invariably a prelude to indiscriminate war against the left." Nation, Feb. 3, 1940, p. 117, col. 2. But this argument would vitiate any security measures against communism no matter how pressing the circumstances.

<sup>53</sup>94 Cong. Rec. 6279 (May 19, 1948).

of a passport application by a member of a communist political organization, to his actual failure to disclose cognizance of membership in that organization. Though this step may seem to duplicate existing law regarding passport fraud,<sup>54</sup> the result is a uniform requirement for the transmission of this information. Moreover, as the Bill, in § 7 (b), adequately penalizes officials and employees for knowingly issuing passports to communists, discretion is effectively removed from the lower echelons of the executive branch. Though § 7 does not contain any provision regarding visas, subsection (b) could be utilized to include a provision effectively prohibiting a member of the diplomatic or consular service from knowingly issuing a visa to a communist. This would furnish the only available means of regulating visa issuance, for criminal sanctions would have no extra-territorial effect on applicants.

Because those who are members of communist front organizations, but not communist political organizations, are unlikely to be entrusted with the determination and communication of important policy considerations, there would seem to be little need for restricting their foreign travel. Moreover, such restrictions might tend toward the indiscriminate penalizing of liberals by those issuing passports. Therefore, it would seem that § 7 is correct in limiting the sanction to members of communist political organizations.

#### *Recommendations:*

Section 7 (a). It shall be unlawful for any member of a communist political organization, knowing that the organization is a communist political organization—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States without revealing that he is a member of such organization, or,

(2) after sixty days after the date of the enactment of this Act, to use or to attempt to use a passport issued before the enactment of this Act.<sup>55</sup>

(b) It shall be unlawful for any officer or employee of the United States to issue a passport or grant a visa to, or to renew the passport or visa of, any individual, knowing that such individual is a member of a communist political organization; *provided however*, that this subsection shall not be applicable where the Executive Order of the President of the United States authorizes the issuance or granting of such passport or visa, or renewal thereof, to any such individual by name.

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<sup>54</sup>40 STAT. 227 (1917), 22 U. S. C. § 220 (1946).

<sup>55</sup>In lieu of the clause "to use a passport theretofore issued," which is found in § 7 (a) (2), we have substituted "to use a passport issued before the enactment of this Act." This was done to avoid the possible ambiguity of "theretofore" as referring to a definite date.

## II. Federal Employment

The augmented fear of Russian Communism has led to an increasing demand—in spite of vigorous objections<sup>56</sup>—for the removal of its advocates from federal employment. Under our present economy, in which government employment plays a relatively minor rôle in the channels of individual opportunity, the impact of such a program on civil liberties is not very great. However, undesirable ramifications may result in some cases of removal from a presently held job, such as problems of readjustment created by specialized government employment, or blacklisting by private employers. But in light of recent disclosure of large scale espionage activities in America,<sup>56a</sup> as well as in Canada<sup>57</sup> there would seem to be maximum justification for countermeasures against communists in our government.

Should such countermeasures be applied only to those in positions which involve trust, influence, or opportunity for espionage?<sup>58</sup> The difficulty of administering any such distinction, the subtle influence of communists even in subordinate positions, and the irony of the Government's financially supporting those who are committed to the aid of a foreign power, may lead to the conclusion that an all-embrasive prohibition is needed. But the barring of a stenographer from the SEC because she is a communist is an act largely retributive, going beyond the reasons underlying this legislative objective, though it may be rationalized in terms of "government integrity."<sup>59</sup> Moreover, a corollary of prohibiting communists from all government jobs may well be the creation of a secret organization, examining the private lives of hundreds of thousands and compiling vast secret dossiers.<sup>60</sup>

Before the last war, emphasis had been increasingly placed on protection against political discrimination.<sup>61</sup> Not until after 1939, when the

<sup>56</sup>E.g., A. L. Pomerantz, N. Y. Times, May 4, 1947, § 4, p. 10, col. 5; O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592 (1948). Compare the interesting juxtapositions of the following sections appearing in [1933] REICHSGESETZBLATT, pt. 1, p. 195: *First Regulation for Administration of the Law for the Restoration of the Professional Civil Service of 11 April 1933*—

"1. Unfit, are all civil servants who belong to the communist party or communist-aid or supplementary organization. They are, therefore, to be discharged.

"2. If a civil servant was not already a civil servant on 1 August 1914, he must prove that he is of Aryan descent. . . ."

<sup>56a</sup>See note 12 *supra*.

<sup>57</sup>CANADIAN REPORT (1946).

<sup>58</sup>As compared with Britain and Canada, the United States seems to be willing to go beyond this line. CANADIAN REPORT 689 (1946); Time, March 29, 1948, p. 40, col. 2 (statement by Mr. Attlee).

<sup>59</sup>H. R. REP. NO. 1844, 80th Cong., 2d Sess. 5 (1948).

<sup>60</sup>For a convincing article on the desirability of such a limitation see O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592 (1948). But cf. CHAMBER OF COMMERCE, COMMUNISTS WITHIN THE GOVERNMENT (1947).

<sup>61</sup>E.g., 37 STAT. 555 (1912), 5 U. S. C. § 652 (1946); N. Y. CIV. SERV. LAW § 25; see

Hatch Act<sup>62</sup> was passed, did a mutation in governmental policy take place.<sup>63</sup> As a result, there is little constitutional law dealing directly with political discrimination in public employment.

Since it is generally agreed that there is no "property" in a public job,<sup>64</sup> the due process clause of the Fifth Amendment would seem to afford direct protection against political discrimination only if the right to such a job can be included within the concept of "liberty."<sup>65</sup> Even if this latter suggestion, which finds little support in the decisions, were adopted, it would only strike down legislation which is arbitrary, or without reasonable relation to some purpose within the competency of the government to effect.<sup>66</sup> An identical test<sup>67</sup> of a statute's constitutional validity can be reached by embodying within the Fifth Amendment the limitations on discriminatory legislation established by the equal protection clause of the Fourteenth Amendment.<sup>68</sup>

Because of the *in terrorem* effect of discriminatory legislation on freedom of speech, some persons have advocated that the clear and present danger rule should be the applicable constitutional standard instead of the reasonable relationship test.<sup>69</sup> If this view were adopted, the court would again have to weigh the extent of the infringement with the existence of substantive evils. But in fact, the language of one Supreme Court decision<sup>70</sup> would seemingly allow complete arbitrary discrimination on the basis that the government in such cases is acting in its proprietary capacity, and is therefore *pari passu* with private

Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 417 n. 108 (1945).

<sup>62</sup>53 STAT. 1148 (1939), as amended, 5 U. S. C. 118 j (Supp. 1948).

<sup>63</sup>E.g., 55 STAT. 403 (1941) (proviso in appropriations bill); 56 STAT. 1053 (1942), 5 U. S. C. § 652 (1946) (summary removal from War and Navy Departments in interest of national security); 5 CODE FED. REGS. § 18.2 (c) (4) (Cum. Supp. 1943) (reasonable doubt as to disloyalty).

A similar shift occurred in the states. E.g., N. Y. CIV. SERV. LAW § 12-a; see Groner, *State Control of Subversive Activities in the United States*, 9 FED. B. J. 61, 69 (1947).

<sup>64</sup>E.g., Friedman v. Schwellenbach, 159 F. 2d 22 (App. D. C. 1946), cert. denied, 331 U. S. 865, 67 Sup. Ct. 979 (1947); Wetzel v. McNutt, 4 F. Supp. 233 (S. D. Ind. 1933); see 2 COOLEY, CONSTITUTIONAL LIMITATIONS 746 n. 1 (8th ed. 1927).

<sup>65</sup>See Rogers v. Common Council, 123 N. Y. 173, 186, 25 N. E. 274, 277 (1890); Note, 60 HARV. L. REV. 779 (1947).

<sup>66</sup>Hirabayashi v. United States, 320 U. S. 81, 63 Sup. Ct. 1375 (1943); VAN COTT, CONSTITUTIONAL LAW § 154 (1948).

<sup>67</sup>E.g., Ohio ex rel. Clark v. Deckebach, 274 U. S. 392, 47 Sup. Ct. 630 (1927); American Sugar Refining Co. v. New Orleans, 179 U. S. 89, 21 Sup. Ct. 646 (1900); see Note, 60 HARV. L. REV. 779 (1947). A rational basis for legislative judgment is all that is required. E.g., Kotch v. Board of River Port Pilot's Comm'rs, 330 U. S. 552, 67 Sup. Ct. 910 (1947).

<sup>68</sup>United States v. Schneider, 45 F. Supp. 848 (E. D. Wis. 1942) (prohibition against work relief for communists, Nazis and aliens held invalid); United States v. Yount, 267 Fed. 861 (W. D. Pa. 1920); see Note, 48 COL. L. REV. 253, 256 (1948).

<sup>69</sup>See Notes, *Conduct Proscribed as Promoting Violent Overthrow of the Government*, 61 HARV. L. REV. 1215 (1948); 96 U. OF PA. L. REV. 381, 401 n. 155 (1948).

<sup>70</sup>Hein v. McCall, 239 U. S. 175, 36 Sup. Ct. 78 (1915).

entrepreneurs.<sup>71</sup> This has been vigorously criticized,<sup>72</sup> and its repudiation is foreshadowed by a recent statement by Mr. Justice Reed that no one would deny the lack of congressional power to "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend mass or take any active part in missionary work."<sup>73</sup>

Another possible constitutional limitation on political discrimination is the prohibition against bills of attainder.<sup>74</sup> This condemns a legislative act which inflicts punishment without a jury trial on either named individuals<sup>75</sup> or easily ascertainable members of a group.<sup>76</sup> The recent Supreme Court decision in *United States v. Lovett* made clear that "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."<sup>77</sup> This prohibition will be specifically dealt with in relation to the problem of defining those to be covered by this Act, as it is felt that whether the legislation is considered a bill of attainder may well depend upon whether that definition establishes an easily ascertainable group.<sup>78</sup>

Another limitation on congressional action to remove certain federal officers stems from the separation of powers.<sup>79</sup> The *Myers* case<sup>80</sup> denied legislative power to regulate presidential removal of officers whose duties are predominantly executive or administrative.<sup>81</sup> Lacking power to restrict executive action, seemingly Congress would also lack the power to remove these officers.<sup>82</sup> The Court in that case explicitly distinguished,

<sup>71</sup>See Bartlett, C. J., concurring in *People v. Crane*, 214 N. Y. 154, 175, 108 N. E. 427, 434 (1915), *aff'd*, 239 U. S. 195, 36 Sup. Ct. 85 (1915). But see *Gianatasio v. Kaplan*, 142 Misc. 611, 613, 255 N. Y. Supp. 102, 105 (Sup. Ct. 1931), *aff'd*, 257 N. Y. 531, 178 N. E. 782 (1931), *appeal dismissed*, 284 U. S. 595, 52 Sup. Ct. 203 (1932).

<sup>72</sup>Powell, *The Right to Work for the State*, 16 Col. L. Rev. 99 (1916).

<sup>73</sup>*United Public Workers of America v. Mitchell*, 330 U. S. 75, 100, 67 Sup. Ct. 556, 569-70 (1947).

<sup>74</sup>U. S. CONST. Art. I, § 9. A similar prohibition is found against the states. U. S. CONST. Art. I, § 10.

<sup>75</sup>1 COOLEY, CONSTITUTIONAL LIMITATIONS 536 (8th ed. 1927); *Lovett v. United States*, 328 U. S. 303, 66 Sup. Ct. 1073 (1946).

<sup>76</sup>*Ex parte Garland*, 4 Wall. 333 (U. S. 1867); cf. *Cummings v. Missouri*, 4 Wall. 277 (U. S. 1867) (state bill of attainder).

<sup>77</sup>328 U. S. 303, 316, 66 Sup. Ct. 1073, 1079 (1946).

<sup>78</sup>See notes 102 *et seq.*, *infra*.

<sup>79</sup>U. S. CONST. Art. II, §§ 1, 2, 3, 4.

<sup>80</sup>*Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21 (1926).

<sup>81</sup>*Accord*, *Morgan v. Tennessee Valley Authority*, 115 F. 2d 990 (C. C. A. 6th 1940). However, the *Myers* case was qualified in *Humphrey's Ex'r v. United States*, 295 U. S. 602, 55 Sup. Ct. 869 (1935).

<sup>82</sup>"Our conclusion on the merits . . . is . . . that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior officers . . . after it has vested . . . their appointment in other authority than the President with the Senate's consent. . . ." *Myers v. United States*, 272 U. S. 52, 163-64, 47 Sup. Ct. 21, 41 (1926). See Mr. Justice Frankfurter concurring in *Lovett v. United States*, 328 U. S. 303, 328, 66 Sup. Ct. 1073, 1085 (1946).

however, the legitimate and often exercised congressional power to prescribe qualifications for office, "provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."<sup>83</sup> Even though this seems to be a valid constitutional limitation, its safeguards apply only to some appointive officials.

Thus, although many constitutional issues may be presented, discriminatory legislation as to most federal employees will be sustained, if it has a rational basis.

The Hatch Act of 1939,<sup>84</sup> the first important statute dealing with political discrimination, forbids the employment of those who advocate "the overthrow of our constitutional form of government." Lack of rigid enforcement, difficulty of proving Communist Party membership, and judicial recognition that membership in a political party does not, of necessity, indicate acceptance of that party's program,<sup>85</sup> has rendered the Act practically useless.<sup>86</sup>

The President's Loyalty Order of March 21, 1947,<sup>87</sup> lists as one of the factors to be considered in determining disloyalty and subsequent removal from federal employment:

"membership in, affiliation with or sympathetic association with any foreign or domestic . . . group . . . of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive. . . ."<sup>88</sup>

This order should be compared with § 6 (a) of the proposed Mundt-Nixon Bill which makes it unlawful for a member of a "communist political organization," knowing it is such an organization, to seek<sup>89</sup> or accept federal employment without revealing his association, or to hold any non-elective job thirty days after the effective date of the Act.<sup>90</sup> For the first time such person's activity in the government is made a

<sup>83</sup>*Myers v. United States*, 272 U. S. 52, 163, 164, 47 Sup. Ct. 21, 41 (1926). See Mr. Justice Brandeis dissenting, *id.* at 265, 274, 47 Sup. Ct. at 75, 78.

<sup>84</sup>53 STAT. 1148 (1939), as amended, 5 U. S. C. §§ 1181-118 n (Supp. 1948).

<sup>85</sup>*Schneiderman v. United States*, 320 U. S. 118, 63 Sup. Ct. 1333 (1943).

<sup>86</sup>CHAMBER OF COMMERCE, COMMUNISTS WITHIN THE GOVERNMENT 16-17 (1947).

<sup>87</sup>Exec. Order No. 9835, 12 FED. REG. 1935 (1947). Compare a similar policy in Great Britain, *Time*, March 29, 1948, p. 40, col. 2.

<sup>88</sup>Exec. Order No. 9835, 12 FED. REG. 1935, 1938 (1947).

<sup>89</sup>Besides the vagueness of what "to seek" federal employment constitutes, the word would seem too drastic a prohibition.

<sup>90</sup>Even if a communist reveals his affiliation to the employing officer, thus preventing prosecution under § 6 (a) (1), he would literally fall under the language of § 6 (a) (2) as thirty days after the bill's enactment he would be holding a non-elective job. Congress apparently considered these two subsections were exclusive on the basis that the Loyalty Order would prevent such a communist, once his identity was revealed, from working for the Government. It is possible, moreover, that one who violates subsection (1) would also immediately violate subsection (2).

crime; penalties for violation of this section are the same as those applicable to passport violations.

This technique of criminal sanctions would seem to be the most effective method of dealing with the problem. To say, for instance, that an embezzler must merely return the money if apprehended, does not prevent embezzlement; in addition, the ineffective sanction of a refund would necessitate continual large scale security measures to police persons having access to funds.<sup>91</sup> Where criminal sanctions exist, communists will reconsider entering federal employment.

Section 7 of the Bill does not attempt to cover members of communist front organizations. However, under the Loyalty Order, association in an organization labelled "subversive" by the Attorney General is a factor proving disloyalty;<sup>92</sup> it puts the psychological, even if not the legal, burden of proving his loyalty on the individual. Members may be innocent of the fact of communist control of their organization, as they may be working merely to effectuate a program of social and political reform, and the Loyalty Order's *in terrorem* effect on members of liberal associations is alarming. Thus, a combination of the requirement of knowledge on the part of a member of a communist front organization, which is not found in the Loyalty Order, and the criminal sanction found in § 7 of the Mundt-Nixon Bill would seem desirable.

Section 6 (b) of the Bill makes it unlawful for any officer or employee of the United States to appoint or employ any person, *knowing* that such person is a member of a communist political organization. As a practical matter this knowledge will be extremely difficult to prove even in those few sporadic cases in which an employing official aids a communist to violate § 6 (a) (1).<sup>93</sup> This subsection therefore would seem undesirable when balanced against the effect it may have on timid employing officials who may not desire to run the risk of hiring a person whose political views have been labeled by opponents as "left of center."

The procedural safeguards found in the Loyalty Order<sup>94</sup> fall far short

<sup>91</sup>E.g., J. E. Hoover has stated that the President's Loyalty Order will not only require investigation into the lives of almost fifty thousand persons, but also the checking of FBI files concerning over two million employees, and this will no doubt include even those in the lower echelons of government service. *Hearings before the House Subcommittee on Appropriations on Supplemental Appropriations Bill for 1948*, 80th Cong., 1st Sess. 38 (1947). For a bitter attack on the maintenance of a large scale organization to gather information, see O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 609-10 (1948).

<sup>92</sup>Exec. Order No. 9835, 12 FED. REG. 1935, 1938 (1947).

<sup>93</sup>It is possible that even if such a provision were not made, such an official would be criminally liable under normal criminal law as an accessory.

<sup>94</sup>There are four steps: (1) notice and sufficiently specific confrontation to enable a

of the protection afforded by administrative bodies<sup>95</sup> or the courts, yet the severity of punishment is often greater, not only in its immediate impact, but in the stigma attaching to the individual. The important safeguard in evaluating evidence—the right of cross-examination—“will probably not be practicable”<sup>96</sup> in regard to the loyalty procedure. Moreover, judicial review will probably be limited to procedural good faith;<sup>97</sup> findings of fact, even if arbitrary, will not be disturbed.<sup>98</sup> Under § 6 (a) of the Mundt-Nixon Bill, and under our recommended substitute for both the Bill and the Loyalty Order, violations would be prosecuted through normal criminal trial procedure, safeguarded by the requirements for proof beyond a reasonable doubt and for adequate appellate review.

*Recommendations:*

1. Presidential revision of the Loyalty Order to strike out in factor (f) the words “communist” and “subversive” as determinatives of disloyalty.<sup>99</sup>

2. Be it enacted:

Section 6 (a). It shall be unlawful for any member of a communist political organization, knowing that the organization is a communist political organization—

(1) to accept a non-elective position of security under the United States; or

(2) after thirty days after the date of the enactment of this Act, to hold any non-elective position of security under the United States.

(b) It shall be unlawful for any person (i) after a final order of the Attorney General is issued classifying an organization as a communist front organization according to the procedure established by §§ 13 and 14 of this Act, and (ii) after notice has been posted that this organization has been so classified—

(1) to hold any non-elective position of security under the

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person to defend himself; (2) hearing, with right to counsel and right to present witnesses; (3) appeal from Loyalty Board decision to head of own department; (4) appeal to Civil Service Commission Loyalty Review Board for an advisory recommendation. Exec. Order No. 9835, 12 FED. REG. 1935, 1937-38 (1947).

<sup>95</sup>E.g., AD. PROC. ACT, 60 STAT. 237, 5 U. S. C. §§ 1001 *et seq.* (1946).

<sup>96</sup>Seth Richardson, U. S. Civil Service Comm'n Press Release, Dec. 23, 1947. As was aptly stated in a recent article, “What a shock would come to any lawyer if he were to witness a criminal trial and a conviction for crime based upon secret and undisclosed evidence.” O'Brian, *Loyalty Tests and Guilt by Association*, 61 HARV. L. REV. 592, 609 (1948).

<sup>97</sup>Borak v. Biddle, 141 F. 2d 278 (App. D. C. 1944), *cert. denied*, 323 U. S. 738, 65 Sup. Ct. 42 (1944).

<sup>98</sup>Eberlein v. United States, 257 U. S. 82, 42 Sup. Ct. 12 (1921); Levine v. Farley, 107 F. 2d 186 (App. D. C. 1939), *cert. denied*, 308 U. S. 622, 60 Sup. Ct. 377 (1940).

<sup>99</sup>It would seem that the Mundt-Nixon Bill does not change the effect of the Loyalty Order but merely adds its own criminal sanctions. *But cf.* 94 Cong. Rec. 6007 (May 14, 1948).



United States at the time of the posting of such notice and sixty days thereafter to become or remain a member of this organization as long as such classification remains attached to it.

(2) at any time subsequent to the posting of the notice to hold any non-elective position of security under the United States and sixty days after acquiring such a position of security to remain or become a member of this organization as long as such classification remains attached to it.

(c) "Positions of security" is herein defined as any office or employment which is determined by the ABC Board to involve trust, influence, or opportunity for espionage.

(d) Any such determination as made in subsection (c) of this section by the ABC Board shall be conclusive, unless found to be arbitrary in a criminal prosecution under this section.

(e) It shall be the duty of the ABC Board to send each month to all officers and employees in positions of security a list of those organizations which by a final order of the Attorney General are required to register as communist front organizations. Failure to send this notice or failure to include any organization in the list in any month will suspend the operation of subsection (b) of this section during that month for those organizations to which notice was not sent. In any case where an organization's classification as a communist front organization is canceled, the ABC Board shall immediately notify all persons in positions of security. It shall also be the duty of the ABC Board to send every ninety days to all officers and employees in positions of security a notification that such a position has been classified as one of security.

(f) Notice required to be posted by subsection (b) (ii) of this section shall be posted in a reasonable place and in a conspicuous manner in all places where two or more government employees are employed.

Section 15 (d). Any person violating § 6 of this Act shall, upon conviction thereof, be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or by both such fine and imprisonment.

(e) In any case in which a conviction is not obtained for violation of § 6, all compensation withheld because of the alleged violation shall be paid to the defendant, even though during such time his employment was suspended or terminated because of such alleged violation.

### *III.. Communist Front Organizations*

The success with which the internationalism of the "Communist Manifesto" has been fused with domestic social reform programs through communist use of the "front organization" technique, merits serious attention. This technique has not only achieved, to some extent, the completely non-rational association of Russia's policies with such re-

forms but has garnered both American dollars and adherents for carrying out communist plans. Because many Americans might withdraw their support if the organization's true nature and purposes were disclosed, many have advocated the disclosure of such facts by a system of compulsory registration<sup>100</sup> of these organizations.

Registration, by placing duties and corresponding liabilities on the group rather than directly on the individual, involves a comparatively new approach in limiting civil liberties. But the objective of registration—to afford the public an opportunity to make a balanced judgment of an organization's worth, by knowledge of its background and connections—has been said to lie “implicitly at the heart of the traditional American form of government.”<sup>101</sup> This objective, however, can only be achieved through compulsory registration enforced by criminal sanctions; it would be naïve to expect organizations to register themselves voluntarily as “subversive.” Thus, a legislative technique of direct control is used as a forerunner to a publicity program of an unveiling nature.

However, many objections can be made to any registration plan. Not only may the registration of communist front organizations be felt to lay down dangerous precedents for putting minority groups “beyond the pale,” but, because of the stigma attached, many individuals might be reluctant to join, support, or remain in a registered organization. Moreover, too broad a definition of a communist front organization may act as a dragnet; even if such is not the case, effective enforcement might require Herodian registrations. And the difficulties involved in determining whether an organization is a communist front might mask the personal vindictiveness of those entrusted with that determination.

But a registration plan drawn to meet these objections helps to resolve the fundamental dilemma with which this article began, as it undermines the influence of communist organizations without involving their suppression.

Perhaps the first attack that legislation requiring registration of a particular group must face is the claim that it constitutes a bill of attainder.<sup>102</sup> It would seem that whether or not a definition of “com-

<sup>100</sup>Rep. Lucas, 94 Cong. Rec. 6267 (May 19, 1948); Sen. Taft, *How Should Democracy Deal with Groups Which Aim to Destroy Democracy?*, Town Meeting, May 18, 1948, p. 7, col. 1. Some have proposed registration of all groups which attempt to influence public opinion. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* 164 (1947); New Yorker, June 12, 1948, p. 17.

<sup>101</sup>Smith, *Democratic Control of Propaganda Through Registration and Disclosure*, 6 PUB. OP. Q. 27 (1942).

<sup>102</sup>See *United States v. Lovett*, 328 U. S. 303, 66 Sup. Ct. 1073 (1946). In one attack on the constitutionality of the Mundt-Nixon Bill this point was stressed most. NATIONAL LAWYERS GUILD, *CONSTITUTIONALITY OF THE MUNDT-NIXON BILL* (1948).

munist front organization" would make the statute a bill of attainder, because directed at "easily ascertainable members of a group,"<sup>103</sup> is less a question of law than it is one of draftsmanship. The rationale of the requirement that legislation be of general applicability seemingly is that proscription in general terms is in itself some measure of safety, because when greater numbers are affected, they can amass more political power in self-defense than could individuals.<sup>104</sup> Moreover, a requirement of proscription in general terms, setting down uniform standards, prevents vindictive singling out of any one individual or organization.<sup>105</sup>

Thus, the definition must be broad enough to preclude being classified as a bill of attainder,<sup>106</sup> no due process attack on the grounds of vagueness can be successfully maintained if the registration statute inflicts punishment only after an organization's non-compliance with a judicial determination that it must register.

Though historically no enactment could be a bill of attainder unless providing for capital punishment,<sup>107</sup> American decisions have broadened the area of penalties which will be considered "punishment."<sup>108</sup> The publicity opprobrium, and possible loss of employment attendant to the investigation of the House Un-American Activities Committee—all of which may possibly follow compulsory registration—has been said to constitute such punishment.<sup>109</sup> But it seems unlikely that the Supreme Court will be ready to go this far, as then almost any legislation having

<sup>103</sup>United States v. Lovett, 328 U. S. 303, 315-16, 66 Sup. Ct. 1073, 1079 (1946). Most statutes held invalid in the United States as bills of attainder have been directed at classes rather than at individuals. See, e.g., *Ex Parte Garland*, 4 Wall. 333 (U. S. 1866) (Confederate lawyers); *Cummings v. Missouri*, 4 Wall. 277 (U. S. 1866); (Confederate priests); *In re Yung Sing Hee*, 36 Fed. 437 (C. C. D. Ore. 1888) (Chinese laborers); *Gaines v. Buford*, 1 Dana 481 (Ky. 1833) (landlords); see Note, 46 Col. L. Rev. 849 (1946).

<sup>104</sup>Because communist organizations currently have little political power in Congress, and because they are particularly subject to vindictive action due to popular distaste for them, the traditional test of a bill of attainder as being directed at an "easily ascertainable group" may possibly be dispensed with.

<sup>105</sup>"With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such and similar acts of violence and injustice, I believe, the Federal and State legislatures, were prohibited from passing any bill of attainder, or any *ex post facto* law." *Calder v. Bull*, 3 Dall. 386, 389 (U. S. 1798).

<sup>106</sup>In Revolutionary days, bills of attainder were frequent. See Pound, *Justice According to Law*, 14 Col. L. Rev. 1, 7 (1914); Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 Ill. L. Rev. 81, 147 (1908).

<sup>107</sup>See 16 LEGAL OBSERVER 305 (1838); Norville, *Bill of Attainder—A Rediscovered Weapon Against Discriminatory Legislation*, 26 ORE. L. REV. 78 (1947); Note, 46 Col. L. Rev. 849 (1946); 33 VA. L. REV. 88 (1947).

<sup>108</sup>See *Cummings v. Missouri*, 4 Wall. 277 (U. S. 1866); *Ex parte Garland*, 4 Wall. 333 (U. S. 1866) (capital punishment not necessary). This trend was carried to the point of considering as requisite punishment, permanent deprivation from federal employment. *United States v. Lovett*, 328 U. S. 303, 66 Sup. Ct. 1073 (1946).

<sup>109</sup>See *Barsky v. United States*, 167 F. 2d 241, 254 (App. D. C. 1948) (dissenting opinion).

any direct deleterious effects on a named class could be construed as a bill of attainder.<sup>110</sup>

While not precisely analogous to a license requirement, the effect of this registration is to require disclosure before further solicitation by communist organizations. Such a condition precedent may well infringe indirectly upon freedom of speech. The Supreme Court said in *Thomas v. Collins*<sup>111</sup> that "as a matter of principle, a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly."<sup>112</sup>

But in cases of solicitation, it was once taken for granted that registration was a legitimate condition precedent,<sup>113</sup> however, the same opinion indicates that solicitation and free speech are so inextricably interwoven that here also registration cannot now be required.<sup>114</sup>

On the other hand, it would seem that where the registration requirement has as its purpose something entirely independent of free speech—as where it merely attempts to make supporters cognizant of their association with communist organizations—the criminal sanctions applied for failure to register should be considered as a reasonable method of enforcement only, and not as a condition precedent to solicitation.

Courts have read into the Fifth Amendment the guarantees of the equal protection clause of the Fourteenth.<sup>115</sup> These guarantees, while merely a limit on the power of making classifications in enactment of regulatory legislation, may be highly relevant here because discrimination against only communist organizations is the core of the registration provisions. In determining the validity of such provisions, "a lack of abstract symmetry does not matter,"<sup>116</sup> nor is a mere production of inequality enough.<sup>117</sup> But, as has been previously shown,<sup>118</sup> the consti-

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<sup>110</sup>However, since the Bill's proponents may have intended these deleterious effects, there may be grounds for a distinction.

<sup>111</sup>323 U. S. 516, 65 Sup. Ct. 315 (1945).

<sup>112</sup>*Id.* at 539, 65 Sup. Ct. at 327. See Notes, 33 GEO. L. J. 227 (1945), 43 MICH. L. REV. 1159 (1945).

<sup>113</sup>"Without a doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell v. Connecticut*, 310 U. S. 296, 306, 60 Sup. Ct. 900, 904 (1940).

<sup>114</sup>*Thomas v. Collins*, 323 U. S. 516, 539, 65 Sup. Ct. 315, 327 (1945); see Note, 33 GEO. L. J. 227, 230 (1945); cf. *American Federation of Labor v. Reilly*, 113 Colo. 90, 155 P. 2d 145 (1944).

<sup>115</sup>See note 68 *supra*.

<sup>116</sup>*Patson v. Pennsylvania*, 232 U. S. 138, 144, 34 Sup. Ct. 281, 282 (1914).

<sup>117</sup>*American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 71 Sup. Ct. 43 (1900).

<sup>118</sup>See note 66 *supra*. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field. *Sproles v. Binford*, 286 U. S. 374, 396, 52 Sup. Ct. 581, 588 (1932). See *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 400, 57 Sup. Ct. 578, 585 (1937); *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 226, 34 Sup. Ct. 856 (1914).

tutionality of this classification will depend on whether or not the court considers its purpose reasonably related to the legislation's objectives. Since the court has usually refused to look at whether or not the classification is precisely limited to the objective,<sup>119</sup> this registration would seem to withstand the attack of "due process."

A trilogy of registration statutes, motivated by an attempt to bring under "the pitiless spotlight of publicity" elements considered dangerous to democracy, has preceded the Mundt-Nixon Bill. The first, the Foreign Agents Registration Act of 1938,<sup>120</sup> required propaganda agents subsidized or directed from foreign sources, to disclose that connection by registering as an agent of a foreign principal.<sup>121</sup> As originally enacted, the statute failed to provide criminal sanctions, and limited disclosure to those *directly* engaged in political propaganda; subsequent amendments have not materially helped. Moreover, the Act was inadequately enforced<sup>122</sup> and the information required of those who did register was, at best, sketchy. The Alien Registration Act of 1940,<sup>123</sup> which tended to equate foreign birth with disloyalty, required all aliens in the United States to furnish information concerning their activities. However, its administration has not infringed upon civil liberties.<sup>124</sup> The Voorhis Act of 1940,<sup>125</sup> by requiring registration of all domestic subversive organizations, was primarily designed to supplement the disclosure requirements of the Foreign Agents Registration Act. But it was so narrowly drawn that only organizations subject to foreign control and engaged in either political or civilian military activity, or those indigenous organizations attempting to overthrow any government by violence or engaged in both political and civilian military activity, were required to register. The Act's ineffectiveness can be measured by the fact that not a single fascist or communist organization registered under it.<sup>126</sup>

<sup>119</sup>E.g., *Louisville & Nashville R. R. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676 (1910); *Ohio ex rel. Clarke v. Deckenbach*, 274 U. S. 392, 47 Sup. Ct. 630 (1927).

<sup>120</sup>52 STAT. 631 (1938), as amended, 53 STAT. 1244 (1939), 22 U. S. C. §§ 611-21 (1946).

<sup>121</sup>"Thus the Foreign Agents Registration Act and the Voorhis Act may properly be viewed as an extension to other groups of certain principles of honesty, responsibility, and disclosure which have been applied for some years to users of Second Class Mails, sellers of securities, federally regulated banks, candidates for public offices, holders of civil service positions, and operators of radio stations." Smith, *Democratic Control of Propaganda Through Registration and Disclosure*, 6 PUB. OP. Q. 27, 37 (1942).

<sup>122</sup>Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure*, 10 U. OF CHI. L. REV., 107, 113-22 (1943); cf. Clark, *Hearings Before the Subcommittee on Un-American Activities on H. R. 4422 and H. R. 4581*, 80th Cong., 2d Sess. 22 (1948).

<sup>123</sup>54 STAT. 670 (1940), 8 U. S. C. §§ 451-60 (1946). See Note, 41 COL. L. REV. 159 (1941).

<sup>124</sup>Institute of Living Law, *Combating Totalitarian Propaganda: The Method of Exposure*, 10 U. OF CHI. L. REV. 107, 136-38 (1943). But see CHAFEE, *FREE SPEECH IN THE UNITED STATES* 439-90 (1941).

<sup>125</sup>54 STAT. 1201 (1940), as amended, 18 U. S. C. § 2386 (Supp. 1948).

<sup>126</sup>Following enactment of the Voorhis Act, seven organizations registered under its

The first impression that one draws from the definition of a communist front organization found in § 3 (4) of the Mundt-Nixon Bill is one of vagueness. Use of words and phrases such as "*substantially all the ordinary and usual*," "*control*," "*in general*," and "*reasonable to conclude*" points to the tremendous discretion which will reside in the person or agency deciding whether an organization falls under this definition. Yet, since many limitations will arise subsequent to registration, a precise definition, covering only the exact evil which is sought to be prevented, would seem desirable.

In exempting from classification as communist fronts, organizations having "*substantially all the ordinary and usual*" characteristics of a political party, Congress apparently intended to except present "third parties."<sup>127</sup> Conceivably, communist fronts could convert themselves into miniscule political parties whose main planks would reflect the particular reform on which the organization now allegedly rests. However, such a step would leave behind most persons now being duped, because such persons neither would have faith in small splinter parties nor would want to limit their political expressions to such narrow objectives. Moreover, such a step, by a political application of *inclusio unius est exclusio alterius*, would divide the sources of support from which communist fronts now draw. A mere change in name of the present American Communist Party or a mass consolidation into a political party of the existing communist fronts would fall under a definition of "communist political organization." Therefore, the exclusion provided by subsection (4) is wise, and because of the improbability that present fronts will convert themselves into political parties, the exclusion need not be hedged by ambiguous qualifications, but can be absolute.

In making an affirmative definition of the existence of a front, the Bill includes any organization "(i) . . . under the control of a communist political organization." The key lies in the word "control." In light of the legislative objective of exposing only those organizations deceiving the public,<sup>128</sup> "control" should be said to exist only when a

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provisions. Five of these registered because they advocated violent overthrow of the Nazi government; the other two because they advocated such overthrow of the Russian communist regime.

<sup>127</sup>Rep. Nixon, 94 Cong. Rec. 6220 (May 19, 1948); Rep. Nixon, 94 Cong. Rec. 6175 (May 18, 1948); Rep. Rankin, 94 Cong. Rec. 5991 (May 14, 1948); Rep. Vorys, 94 Cong. Rec. 6021 (May 14, 1948); Rep. Kersten, 94 Cong. Rec. 6027 (May 14, 1948). *But cf.* Rep. Marcantonio, 94 Cong. Rec. 6176 (May 18, 1948).

<sup>128</sup>At least one relevant problem is not faced by this subsection. It deals with the possible existence of organizations clearly under clauses (i), (ii), or (iii) but which cannot be said to dupe the American people. A suppositious example might be "The Communist League for the Aid of the Communist Party." However, forcing such a group to register may be necessary to achieve the effective registration of organizations which also cannot be classified as communist political organizations.

communist political organization makes policy determinations for the organization. Anything less would amount only to influence and would not result in the organization's consciously duping Americans.<sup>129</sup> The presence of communist political organization members in places of authority is, of course, strong evidence of communist control, but the ultimate question in each case should be whether these members make the policy determinations.

The Bill alternatively declares an organization to be a communist front when "(ii) . . . it is primarily operated for the purpose of giving aid and support to a communist political organization, communist foreign government, or the world communist movement." Unless the definition of a communist political organization member is stringent, it is difficult to visualize finding many organizations so operated without also finding the communist strength requisite for "control" under clause (i).

Moreover, some organizations that might be held to fall under clause (ii) but not under clause (i) may not be legitimate prey. For example, may not the American Civil Liberties Union, if expending most of its resources defending the recently indicted officers of the Communist Party be, at that time, "primarily operated for the purpose of giving aid and support to a communist political organization"? Therefore, in order to avoid any such interpretation, clause (ii) should be limited to organizations which are now and may reasonably be expected to continue to operate as indicated in that clause. However, this clause does serve a useful function in possible cases which do not fall under clause (i), and acts as an effective tool where communist direction of policy determinations exists but cannot be proved.

The last alternative definition of a communist front is an organization whose "views and policies are *in general* adopted because such views or policies are those of a communist political organization, a communist foreign government, or such world communist movement." (Italics added.) The problem presented in proving this motivation is practically insurmountable. Although an exact correlation between the policies of an organization and that of any of the three listed contacts would seem conclusive, the use of the qualifying words "in general" might act as a dragnet for any liberal organization which has ever criticized United States policy.<sup>130</sup> This is true despite the saving clause requiring that such criticism be the result of a causal relationship be-

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<sup>129</sup>As originally introduced, the Bill provided that influence was sufficient. This test was dropped in committee.

<sup>130</sup>See Rep. Heselton, 94 Cong. Rec. 6262 (May 19, 1948); Rep. Murdock, 94 Cong. Rec. 6263 (May 19, 1948); Rep. Buchanan, 94 Cong. Rec. 5998 (May 14, 1948).

tween the avowedly communist source and the suspect organization.<sup>131</sup> This third classification would seem to be more an aid to the proof of the other two than it is an independent appraisal; as such it would seem legitimate only where a high correlation exists.

The Bill provides that a suspect organization is a communist front when "it is reasonable to conclude"<sup>132</sup> that it falls within any of the three definitions. Conceivably, under this requirement a preponderance of evidence may be sufficient to prove that it is reasonable to believe that an organization is a communist front; this is quite different from the normal procedure of proving such actually to be the fact.

To aid determinations under the alternative definitions, four considerations<sup>133</sup>—"some or all of" which are to be looked to—are listed in § 3 (4). The use of the word "some" might indicate an option to consider only those factors which show communist domination and to ignore those same factors when they do not.<sup>134</sup> It would, then, seem desirable to rephrase this clause. The first of the four considerations is: "(A) The identity of the persons who are active in its management, direction, or supervision, whether or not holding office therein." Though it is a good idea not to limit this consideration to elective officers, as communists frequently direct from appointive positions, the consideration would seem too broadly phrased. Since any voting member might be considered "active" in an organization's direction, such a clause would invite investigation of the complete membership, something which Congress intended to avoid elsewhere in the Bill.<sup>135</sup> Therefore, it would seem desirable to limit this consideration to the identity of those having any positions which involve executive or supervisory functions; this would not detract from the value of the consideration, which was to aid determination of the applicability of clause (i).

"(B) The sources from which an *important part* of its support, financial or otherwise, is derived," (Italics added.) The phrase "important part" could refer as easily to weekly dues as it could to large contributions, thereby allowing investigation of all members. Thus, since this consideration can have value in protecting the American public only as indicating financial support above dues uniformly assessed and collected

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<sup>131</sup>See Rep. Nixon, 94 Cong. Rec. 6265 (May 19, 1948).

<sup>132</sup>Rep. Holifield, 95 Cong. Rec. 6018 (May 14, 1948); Rep. Marcantonio, 94 Cong. Rec. 6179 (May 18, 1948).

<sup>133</sup>The testing of four considerations might make for a judicial application of the doctrine of *inclusio unius est exclusio alterius*. It would seem to be advisable to indicate that these considerations are only typical, not exclusive.

<sup>134</sup>Compare criticism of "some" as being too vague. Rep. Holifield, 94 Cong. Rec. 6018 (May 14, 1948).

<sup>135</sup>Sec. 8 (3) and (4). See Rep. Nixon, 94 Cong. Rec. 6282 (May 19, 1948).



or nominal contributions<sup>136</sup> from members of communist political organizations or communist foreign governments, the consideration should be phrased to limit investigation to those sources.

"(C) The use made of its funds, resources, or personnel." This consideration seems a relevant and necessary factor in determinations under any of the alternative definitions.

"(D) The positions taken on or advanced by it *from time to time* on matters of policy." (Italics added.) As indicated in the discussion of clause (iii), this is a dangerous test unless the policy correlation there discussed is high.<sup>137</sup>

#### *Recommendations:*

Section 3 (4). The term "communist front organization" means any organization in the United States (other than a communist political organization and other than an organization having the characteristics of a political party) with respect to which, having regard to the following typical considerations:

(A) the identity of the persons holding executive or supervisory positions in it, whether elective or non-elective;

(B) the extent to which it derives support, financial or otherwise, from members of communist political organizations or communist foreign governments; *provided that*, all dues uniformly assessed and collected, and contributions under twenty-five dollars (\$25) shall not be considered as support;

(C) the use made by it of its funds, resources, or personnel; and

(D) the position from time to time taken or advanced by it on matters of policy;

on a preponderance of evidence, it be found (i) that its policy determinations are made by members of communist political organizations or (ii) that it is primarily operated for the purpose of giving continual aid and support to a communist political organization, a communist foreign government, or the world communist movement; *provided that*, it cannot be shown that there is an immediate prospect of change of such purpose; or (iii) that its views and policies are consistently adopted and advanced because such views and policies are those of a communist political organization, a communist foreign government, or such world communist movement.

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<sup>136</sup>There is a basic inconsistency in exposing to investigation those who give financial support to front organizations, when one of the primary reasons advanced for the necessity of this legislation is the protection of those very people.

<sup>137</sup>Originally, the Bill treated as an incident of communist tactics that of "disturbing trade and commerce." It was felt that this might include those labor unions controlled by communists. Rep. Sabath, 94 Cong. Rec. 5987 (May 14, 1948); Rep. Blatnik, 94 Cong. Rec. 6033 (May 14, 1948); Rep. Norton, 94 Cong. Rec. 6178 (May 18, 1948). However, the proponents denied such coverage. Rep. Kersten, 94 Cong. Rec. 6027 (May 14, 1948). The subsequent removal, on the floor, of this clause seems clearly indicative of Congressional intent.

Registration not only is the sole method of effective disclosure under this legislative objective, but it serves to furnish a constitutional basis for the entire bill. If no registration requirement were provided, the bill would demand no affirmative action by the Attorney General against the organization. Only the opportunity to appeal his order to register before it becomes final will provide the suspect organization with the right of some judicial review. This review would seem to be required by the Constitution because of the affirmative duties and resultant criminal sanctions for non-compliance placed upon such an organization. Analysis of the information required by the registration provisions of subsections (d) and (e) of § 8 must rest first on the extent to which the information required by those subsections fulfills the inquiries of the listed considerations, previously discussed, which test the existence of a communist front. Second, the desirability of these disclosure requirements is inversely proportional to the extent that the required information extends beyond those considerations.

Requirements (1) and (2) of subsection (d) requiring the filing of the name of the organization and its officers are mostly perfunctory. The latter could add more to consideration (A) of § 3 (4) were it to specify that the list include the names of all executive and supervisory officers, whether elective or non-elective. On the other hand, requirement (3), by compelling the listing of all money received or spent, together with a record of its source or purpose, would include every member of a dues-collecting communist front organization. To comply more accurately with consideration (B), as revised, the requirement of listing sources should be limited to those making contributions over twenty-five dollars, excluding normal dues. Moreover, requirements (2) and (3) of subsection (d) by compelling disclosure of information concerning the preceding twelve months would seem to grate against the section's legislative objective of protecting innocent persons. It would seem sufficient to limit disclosure to activities subsequent to the registration order, to be made by supplemental annual reports as provided in subsection (e). But in the main these requirements achieve the legislative goal and go far beyond the sketchy registration provisions of the Foreign Agents Registration Act.

#### *Recommendations:*

Section 8 (d). The registration made under subsection (a) or (b) [by a communist front or a communist political organization] shall be accompanied by a registration statement, to be prepared

and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

- (1) the name of the organization,
- (2) the name and last-known address of each individual who is at the time of the filing of such registration statement, an executive or supervisory officer, whether elective or non-elective,
- (3) an accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) from the time of the registration to the date that such organization registers; *provided that*, such accounting shall not list the sources of such funds received by a communist front organization from all dues uniformly assessed and collected, and cumulative contributions of less than twenty-five dollars (\$25) per registration period.

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement except that no information shall be required under (1), (2) or (3) of subsection (d) of any period prior to the date of the final order of the Attorney General requiring such organization to register.

(f) It shall be the duty of each *communist-political* organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe—

- (1) accurate records of the names and addresses of the members of such organization and
- (2) accurate records and accounts of moneys received and expended (including the sources from which received and the purposes for which expended) by such organization. (Words in italics added to Bill.)

(g) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

The Bill, in § 15 (a), provides that after the Attorney General's order requiring registration becomes final, each day's failure to regis-

ter constitutes, whether on the part of the organization or the responsible individual, a separate offense. Thus in one month fines from \$60,000 to \$150,000 could be levied, or imprisonment from 60 to 150 years could result, or both such fines and imprisonments could be levied. Seemingly, the purpose of this provision is to prevent the organization's exemption from registration requirements after one conviction. Although this provision has been challenged as a "cruel and unusual punishment,"<sup>138</sup> and although a statute's degree of punishment, as well as mode, can be judicially condemned,<sup>139</sup> despite little Supreme Court authority it is doubtful whether § 15 (a) shocks the public sensibility to the requisite degree. But since the objective of adequate enforcement can be accomplished without the severity this section provides, it would seem desirable to make cumulative penalties take effect only every three months.

#### IV. *Disclosure of the Origin of Propaganda*

Disclosing the names of communist organizations to the public is not sufficient, for, as often has been the case in the past, they could produce their propaganda without divulging the source from which it came.

Most of us believe that no matter how despicable the views of others may seem, the right to express these views should not be challenged. The validity of a position does not depend upon the identity of the person taking it, but rather on an independent evaluation after sufficient research. But as a practical matter, this independent determination is in most cases impossible, and in making judgments we are continually influenced by the source from which statements emanate. Moreover, anonymity aids the heretofore discussed association which can be made between specific social reforms which many Americans may favor and the policy of a foreign government.<sup>140</sup>

In light of the Soviet allegiance of American communists, the extensive degree to which they use the technique of concealment, and the success that they have had in influencing public opinion by this technique, a requirement of disclosure would seem to be justified.<sup>141</sup> This disclosure would greatly diminish their influence, not because of government suppression, but rather because of public recognition of their interests. Although it is true that some methods of achieving disclosure

<sup>138</sup>Rep. Holifield, 94 Cong. Rec. 6261 (May 19, 1948); Rep. Celler, 94 Cong. Rec. 6261 (May 19, 1948).

<sup>139</sup>Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544 (1910).

<sup>140</sup>See note 27 *supra*.

<sup>141</sup>See note 28 *supra*.

may infringe upon freedom of expression, the objective of putting the spotlight on communist propaganda does not limit that liberty, but adds to the relevant facts in the market-place of competing ideas.

It seems clear that in order to disclose adequately the source of communist propaganda, it is necessary to include not only the material disseminated or sponsored by the central communist political organization, but also that circulated by communist front organizations. This is true not only to prevent the circumvention of any disclosure requirements by the simple means of setting up a puppet propaganda organization, but also because it is through these organizations that communists have been able to mask the origin of their propaganda most effectively.<sup>142</sup>

Even though the power of Congress to regulate interstate commerce includes the power to prohibit,<sup>143</sup> and the motive of Congress in utilizing the commerce clause would now seem irrelevant,<sup>144</sup> this power is subject to the limitations prescribed in the Bill of Rights.<sup>145</sup> Although, seemingly, control of foreign commerce would be limited to the same extent, a difficulty arises from the fact that, as regards foreign commerce, the Federal Government has derived power not merely from the commerce clause but from its exclusive control over foreign relations.<sup>146</sup> This factor, it might be argued, would raise a political question which the courts would lack "jurisdiction" to decide.<sup>147</sup> But although such a consideration might weigh in a decision's outcome, it is doubtful whether a court would refuse to decide the validity of a statute, involving the First Amendment, on a mere assumption that the legislation was justified by considerations of foreign affairs.

The most serious question concerning the limitations placed on our government by the First Amendment arises in congressional exercise of the postal power.<sup>148</sup> The first important case in the field, *Ex parte Jackson*,<sup>149</sup> involved a statutory prohibition against lottery circulars in

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<sup>142</sup>*E.g.*, CHAMBER OF COMMERCE, COMMUNIST INFILTRATION IN THE UNITED STATES 14-15 (1946); see note 28 *supra*.

<sup>143</sup>*E.g.*, *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913); *Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1903); ROTTSCHAEFER, CONSTITUTIONAL LAW § 239 (1939).

<sup>144</sup>*E.g.*, *United States v. Darby*, 312 U. S. 100, 61 Sup. Ct. 451 (1941); *Wickard v. Filburn*, 317 U. S. 111, 63 Sup. Ct. 82 (1942).

<sup>145</sup>*E.g.*, *Associated Press v. NLRB*, 301 U. S. 103, 57 Sup. Ct. 650 (1937); *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 Sup. Ct. 758 (1935); see VAN COTT, CONSTITUTIONAL LAW 108 (1948); Phillips, *The Growth and Development of the Federal Commerce Power*, 11 TEMP. L. Q. 517 (1937).

<sup>146</sup>WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES § 576 (2d ed. 1929).

<sup>147</sup>*Cf. Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U. S. 118, 32 Sup. Ct. 224 (1912).

<sup>148</sup>U. S. CONST. Art. I, § 8.

<sup>149</sup>96 U. S. 727 (1878).

the mails. The Court, instead of dealing with the case on the basis of an absorbed police power contained in the postal clause, based its decision on the ground that the Amendment is not applicable where Congress did not prohibit the circulation of material by other means. In light of the federal monopoly over the mails<sup>150</sup> and the economic impracticability of circulating publications in any other manner,<sup>151</sup> this basis for the decision is extremely dubious. This becomes even more obvious when, in 1903, the Court, in a case dealing also with lottery circulars,<sup>152</sup> read a "federal police power" into the commerce clause<sup>153</sup> thus blocking the so-called "other media."

Although this "other media" theory was at times reiterated,<sup>154</sup> most of the succeeding cases placed their decisions on the basis that the Government was acting in a proprietary capacity,<sup>155</sup> and therefore the use of the mails was a privilege upon which Congress "may annex such conditions as it chooses."<sup>156</sup> Despite the fact that all these earlier cases<sup>157</sup> could have been decided on a legitimate exercise of police power, the privilege rationale applied in some of them was later carried over to cases dealing with the intellectual content of matter sent through the mails.<sup>158</sup> But the extension of this rationale was met with vigorous dissents by Justices Holmes and Brandeis,<sup>159</sup> who claimed that "The

<sup>150</sup>REV. STAT. § 3829 (1875), 18 U. S. C. § 1729 (Supp. 1948).

<sup>151</sup>See Mr. Justice Holmes, dissenting, *Leach v. Carlile*, 258 U. S. 138, 141, 47 Sup. Ct. 227, 229 (1922); Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 732 (1938); see Legis., 38 COL. L. REV. 474, 477-78 (1938); Note, 28 VA. L. REV. 634, 641 (1942).

<sup>152</sup>*Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321 (1903).

<sup>153</sup>See, e.g., *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, 299 U. S. 334, 347, 57 Sup. Ct. 277, 280 (1937); *Weber v. Freed*, 239 U. S. 325, 36 Sup. Ct. 131 (1915); *Hoke v. United States*, 227 U. S. 308, 33 Sup. Ct. 281 (1913); *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364 (1911); see Note, 42 COL. L. REV. 1333, 1334 (1942).

<sup>154</sup>*In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374 (1892); Perlman and Ploscowe, *False Defamatory Anti-racial and Anti-religious Propaganda and the Use of the Mails*, 4 LAW. GUILD REV. 13 (1944).

<sup>155</sup>See Legis., 38 COL. L. REV. 474, 478 (1938); Note, 45 MICH. L. REV. 230, 232 (1946).

<sup>156</sup>*Public Clearing House v. Coyne*, 194 U. S. 497, 506, 24 Sup. Ct. 789, 793 (1904); see *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 33 Sup. Ct. 867 (1913); *Gitlow v. Kiely*, 44 F. 2d 227 (S. D. N. Y. 1930), *aff'd*, 49 F. 2d 1077 (C. C. A. 2d 1931), *cert. denied*, 284 U. S. 648, 52 Sup. Ct. 29 (1931); *Warren v. United States*, 183 Fed. 718 (C. C. A. 8th 1910).

<sup>157</sup>*Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. Ct. 789 (1904) (fraud order); *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374 (1892) (lottery ad in newspaper); *Ex parte Jackson*, 96 U. S. 727 (1878) (lottery circular); *Warren v. United States*, 183 Fed. 718 (C. C. A. 8th 1910) (defamatory envelope).

<sup>158</sup>*United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 41 Sup. Ct. 352 (1921); *Gitlow v. Kiely*, 44 F. 2d 227 (S. D. N. Y. 1930), *aff'd*, 49 F. 2d 1077 (C. C. A. 2d 1931), *cert. denied*, 284 U. S. 648, 52 Sup. Ct. 29 (1931); *Masses Publishing Co. v. Patten*, 246 Fed. 24 (C. C. A. 2d 1917); *Burleson v. United States ex rel. Workingmen's Cooperative Publishing Ass'n*, 274 Fed. 749 (App. D. C. 1921), *dismissed per stipulation*, 260 U. S. 757, 43 Sup. Ct. 94 (1923).

<sup>159</sup>*Leach v. Carlile*, 258 U. S. 138, 42 Sup. Ct. 227 (1922); *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 41 Sup. Ct. 352 (1921); see *Schaefer v. United States*, 251 U. S. 466, 494, 40 Sup. Ct. 259, 269 (1920).

United States may give up the post office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues."<sup>160</sup> In light of the re-establishment of the "clear and present danger" rule<sup>161</sup> and the extent to which recent decisions have gone in order to protect freedom of expression,<sup>162</sup> the Government's power over the mails would seem to be restricted by the First Amendment to the same extent as in control of speech.<sup>163</sup>

Although today many statutes forbid the transmission of certain materials through commerce under the "federal police power,"<sup>164</sup> a statute which prohibited material of a prescribed political nature would still have to fall within the clear and present danger rule. Even under this rule statutes prohibiting the transmission of material advocating treason or insurrection,<sup>165</sup> or circulation of matter which aids in the obtaining<sup>166</sup> or disclosing<sup>167</sup> of information affecting the national defense, or dissemination of seditious material in time of war,<sup>168</sup> would seemingly be

<sup>160</sup>Mr. Justice Holmes, dissenting in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 437, 41 Sup. Ct. 352, 363 (1921); see ROGERS, *POSTAL POWER OF CONGRESS* 178 (1916) (use of post office a matter of right). Even if it is considered a privilege, to say that Congress can condition its grant so as to reduce the guarantees of a free press, seems very doubtful. See Merrill, *Unconstitutional Conditions*, 77 U. OF PA. L. REV. 879 (1929); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COL. L. REV. 321 (1935); Kadin, *Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting*, 19 B. U. L. REV. 533, 548 (1939); Legis., 38 COL. L. REV. 474, 489 (1938).

For a very short but excellent analysis on the due process limitation of the postal power, concluding that even though use of the mails has been classified as a privilege, a reasonable relationship test must be satisfied, see Legis., 38 COL. L. REV. 474, 490 (1938); also ROTTSCHAEFER, *CONSTITUTIONAL LAW* § 180 (1939).

<sup>161</sup>E.g., *Pennekamp v. Florida*, 328 U. S. 331, 66 Sup. Ct. 1029 (1946); *Thomas v. Collins*, 323 U. S. 516, 65 Sup. Ct. 315 (1944); *Bridges v. California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941); *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940). But cf. Hoar, *Subversive Activities Against Government—Two Conflicting Doctrines*, 27 MARQ. L. REV. 72 (1943).

<sup>162</sup>E.g., *Grosjean v. American Press Co.*, 297 U. S. 233, 56 Sup. Ct. 444 (1936); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 51 Sup. Ct. 625 (1931). See the very strong protective language used in *Bridges v. California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941).

<sup>163</sup>In *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 156, 66 Sup. Ct. 456, 461 (1946), the Court said, "But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever." See WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES* § 656 (2d ed. 1929); Comment, 53 YALE L. J. 733, 743 (1944); Legis., 38 COL. L. REV. 474, 487 (1938).

<sup>164</sup>*Mails*: obscene matter, libelous and indecent matter, lotteries, promotion of fraud, intoxicating liquors, poisons or explosives, etc..

*Commerce*: white-slave traffic, prize fight films, stolen vehicles, illegally killed game, etc. See, in general, in 18 U. S. C. (Supp. 1948), those sections which formerly were 18 U. S. C. §§ 301-412 (1946).

<sup>165</sup>40 STAT. 230 (1917), as amended, 18 U. S. C. § 1717 (Supp. 1948).

<sup>166</sup>*Ibid.*, making non-mailable, violations of 40 STAT. 217 (1917), 50 U. S. C. § 31 (1946).

<sup>167</sup>40 STAT. 230 (1917), as amended, 18 U. S. C. § 1717 (Supp. 1948), making non-mailable violations of 40 STAT. 218 (1917), 50 U. S. C. § 32 (1946).

<sup>168</sup>40 STAT. 219 (1917), as amended, 41 STAT. 1359 (1921), 50 U. S. C. § 33 (1946), made non-mailable by 40 STAT. 230 (1917), as amended, 18 U. S. C. § 1717 (Supp. 1948). For a discussion of the full extent of censorship power during the war, see Price, *Censorship and Free Speech*, 18 IND. L. J. 17 (1942).

constitutional on their face. But as to the application of these statutes to given facts, "the question in *every case* is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the government] has a right to prevent."<sup>169</sup> On the other hand, a statute prohibiting from interstate or foreign commerce or through the mails the transmission of expression originating from specified sources would clearly be unconstitutional. The rights guaranteed by the First Amendment cover distribution as well as publication,<sup>170</sup> and no matter what past experience has shown about the dangerous views expressed by a particular source, the cornerstone of the First Amendment is the elimination of prior restraints.<sup>171</sup>

The Mundt-Nixon Bill in § 11 (1) makes it unlawful for an organization, once that organization has been determined to be a communist organization, to transmit any publication either in interstate or foreign commerce or through the mails without labeling both the publication and its container. This label must indicate that the publication is disseminated by a communist organization whose name must also appear. As the applicability of this subsection is determined not by the nature of the material sent but by the identity of the sender, if the provision constitutes a restraint on free speech, it will probably be held unconstitutional as a prior restraint, without regard to whether particular material represents a clear and present danger.

Although the Bill does not prohibit the circulation of this material, it does attach a condition upon its dissemination. The performance of this condition, which requires labeling also on the *outside* of the material's container, will deter not merely the sender from publishing, but because of the public stigma attached, will also deter the consumer from receiving. However, just as newspapers are required by law to distinguish clearly between news and advertising columns in order to prevent fraud,<sup>172</sup> it might be argued that the condition here is merely to prevent a similar fraud being perpetrated by non-disclosure of the source.<sup>173</sup>

<sup>169</sup>(Italics added.) *Schenck v. United States*, 249 U. S. 47, 52, 39 Sup. Ct. 247, 249 (1919).

<sup>170</sup>*E.g.*, *Winters v. New York*, 333 U. S. 507, 509, 68 Sup. Ct. 665, 667 (1948); *Lovell v. City of Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1938).

<sup>171</sup>*See, e.g.*, *Mr. Justice Holmes dissenting, in United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 437, 41 Sup. Ct. 352, 363 (1921); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 51 Sup. Ct. 625 (1931); *Patterson v. Colorado*, 205 U. S. 454, 27 Sup. Ct. 556 (1907); 4 COOLEY'S BLACKSTONE 151 (1871); 2 STORY, CONSTITUTION § 1880 (1836). But see *Deutsch, Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 714-15 (1938).

<sup>172</sup>*E.g.*, 37 STAT. 553, 554 (1912), as amended, 47 STAT. 1486 (1933), 39 U. S. C. §§ 233, 234 (1946); *cf.* WIS. STAT. §§ 12.12, 12.14 (1945) (political ads).

<sup>173</sup>"The public interest in a free press does not necessarily run counter to requirements which mean that adequate information is to be furnished on the basis of which the



In any case the Bill might be unconstitutional, for it has been repeatedly stated that in legislation which involves the First Amendment the statute "must be narrowly drawn to meet the precise evil the legislation seeks to curb."<sup>174</sup> The Bill in requiring labeling on the publication's "envelope, wrapper, or other container" does not bring about any additional disclosure to the consumer, but does act as a deterrent to the sending and the receiving of these publications. It would seem that if the substantive evils sought to be prevented are concealment from and fraud upon the consumer, such disclosure should only be required in a place where it can reasonably be calculated to be brought to the reader's attention. Such disclosure seems to deal adequately with the evil while not substantially affecting enforcement.<sup>175</sup> Moreover, this disclosure would not reduce the buyer's freedom to sell his ideas on the market to those who desire to purchase.

Any attempt to place conditions on the nature of material sent rather than upon the sender would probably, even were it to pass the clear and present danger test,<sup>176</sup> be too vague to enforce with criminal sanctions.<sup>177</sup> Without these sanctions little could be accomplished in achieving this legislative objective.

The Mundt-Nixon Bill in § 11 (2) prohibits communist or political front organizations from radio broadcasting<sup>178</sup> unless the broadcast is

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public can value the accuracy and bias of opinions published in newspapers." *Deutsch, Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 740 (1938); see *Institute of Living Law, Combating Totalitarian Propaganda: Method of Exposure*, 10 U. OF CHI. L. REV. 107 (1943); cf. *Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 33 Sup. Ct. 867 (1913).

It should be noted here that the protection even as to previous restraint has been recognized to be not absolutely unlimited. *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 51 Sup. Ct. 625 (1931); see *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 438, 31 Sup. Ct. 492, 497 (1911).

<sup>174</sup>*United States v. C. I. O.*, 335 U. S. 106, 141, 68 Sup. Ct. 1349, 1367 (1948). See *United Public Workers v. Mitchell*, 330 U. S. 75, 110, 67 Sup. Ct. 556, 574 (1947); *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1940).

<sup>175</sup>The types of material which are sent to "innocent" consumers, thus making disclosure desirable, can easily be obtained through the mail by any person desiring to enforce this section. And although the Fourth Amendment protects the mails from unreasonable searches and seizures, a distinction seems to have been drawn "between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets and other printed matter, purposely left in a condition to be examined." *Ex parte Jackson*, 96 U. S. 727, 733 (1878); WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES § 657 (2d ed. 1929).

<sup>176</sup>"... it must necessarily be found, as an *original* question, that the specified publications involved created such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection." (Italics added.) *Bridges v. California*, 314 U. S. 252, 261, 62 Sup. Ct. 190, 193 (1941).

<sup>177</sup>The authors were unable to formulate, in a criminal statute, a definition which could withstand a due process attack on the grounds of vagueness.

<sup>178</sup>"In any realistic approach to the problem of an American radio policy, it must be recognized that there does not exist in this country any such thing as freedom of the air." Note, 39 COL. L. REV. 447 (1939). By making license renewal depend upon program content or specific acts, the FCC practically exercises a restraint which has been called the "censorship of fear." Kassner, *Radio Censorship*, 8 AIR L. REV. 98 (1937); Siegel, *Censorship in Radio*, 7 AIR L. REV. 1 (1936); see Notes, 47 COL. L. REV. 1041 (1947), 54

preceded by both sponsor's name and the fact that such sponsor is a communist organization. This requirement would seem to raise constitutional questions similar to those discussed in reference to freedom of the press. However, it does seem that the prior restraint on the consuming audience here is no greater, and probably is less, than where disclosure is required only within the publication.<sup>179</sup> But any real necessity for this provision, which was not contained in the original Bill,<sup>180</sup> seems to be lacking. Communists have made only slight use of radio facilities, and sponsorship by front organizations is negligible. In those cases where programs have been sponsored, the sources have usually been disclosed, either by communist volition, or general FCC regulations, or practice of the station. This being the case, it would seem undesirable to draft a statute which in any event will raise serious constitutional issues, when the desired result may be achieved by familiarizing the public with those organizations that have been required to register under the Act.

Certain undesirable clauses are present in § 11 of the Mundt-Nixon Bill which it would seem well to change. The Bill speaks in subsection (1) of—

“. . . any *publication* which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless *such publication* . . . bears the following. . . .” (Italics added.)

In the context in which the first “publication” is used it would seem to mean any article published for the consumption of more than one person. However, as used in the latter part of the sentence “publication” must mean any individual copy of that article because the labeling of which it speaks can refer only to single copies. This is made clear by § 3 (6) which defines publication to mean “any circular, newspaper, pamphlet, book, letter, postcard, leaflet, or other publication.” Thus, as “publication” means each individual copy, the use of the singular form will create doubt in many cases whether or not any given copy was intended to be circulated among two or more persons.

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HARV. L. REV. 1220 (1941). For the Commission's right to deny a license on the basis of public interest when challenged as a violation of the First Amendment, see *Trinity Methodist Church, South v. Federal Radio Comm'n*, 62 F. 2d 850 (App. D. C. 1932).

See the rather “interesting contention” once made by the FCC that broadcast speech is not within the First Amendment because the audience only hears an electrical reproduction of the original speech. Caldwell, *Radio: The Fifth Estate, Freedom of Speech and Radio Broadcasting*, 177 ANNALS 182 (1935).

For the basis of federal control of radio, see McManus, *Federal Legislation Regulating Radio*, 20 SO. CALIF. L. REV. 146 (1947); 9 AIR. L. REV. 81 (1938).

<sup>179</sup>This would seem true as such disclosure over the radio would have but negligible deterrent effect on those who wanted to listen to the program.

<sup>180</sup>The provision as to disclosure over the radio was added to the Bill in committee.

A second objection is that such coverage includes "letters"; this may mean that a personal letter intended for a man and his wife would be subject to such conditions. The ambiguous catch-all phrase of "reasonable to believe is intended to be" does little to remove the effect of this poor draftsmanship. Certainly this whole clause, as part of a criminal statute, runs the risk of a challenge of vagueness, and may thus result in the whole section's unconstitutionality.

The section also makes it unlawful "for any person acting for or on behalf of such organization to transmit or cause to be transmitted"<sup>181</sup> any article without the required labeling. If literally construed, this results in an outrageous criminal coverage of innocent agents, including mere delivery boys or carriers, since the provision does not require knowledge either as to the type of organization involved or as to whether it has complied with the disclosure provision. It would seem sufficient to limit criminal punishment under § 15 (c) to officers and managers of the defaulting communist organization.

#### *Recommendations:*

Section 11 (1). It shall be unlawful for any organization which is registered under § 8, or for any organization with respect to which there is in effect a final order of the Attorney General requiring it to register

(a) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any newspaper, book, pamphlet, circular, leaflet, periodical, magazine, or any other like printed matter, unless it contains the following, printed once (to be reasonably calculated to disclose the information to the reader) as may be provided in regulations prescribed by the Attorney General, with the name of the organization appearing in lieu of the blank: "Disseminated by \_\_\_\_\_, a communist organization";

(b) subsection (1) shall only take effect sixty days after the Attorney General has sent to the main office of an organization required to conform to that section a registered letter setting forth the regulations he has prescribed according to that section.

Section 15 (f). Any director, officer, or manager of an organization which has violated the provisions of § 11 shall, upon conviction, be punished by a fine of not more than \$5000, or by imprisonment for not more than two years, or by both such fine and imprisonment.

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<sup>181</sup>The mail fraud statute, REV. STAT. § 5480 (1875), as amended, 18 U. S. C. § 1341 (Supp. 1948) formerly read "place, or cause to be placed." This was construed to include agents, partners, accomplices, and those who set the letter in motion and could reasonably foresee that it would be mailed. See 21 MINN. L. REV. 342 (1937). The Reviser's Note to 18 U. S. C. § 1341 (Supp. 1948) states: "A reference to causing to be placed any letter, etc. in any post office, or station thereof, etc. was omitted as unnecessary because of definition of 'principal' in section 2 of this title." 35 STAT. 1152 (1909), as amended, 18 U. S. C. § 2 (b) (Supp. 1948).

## APPENDIX

*Extracts from the Mundt-Nixon Bill, H. R. 5852,  
80th Congress, 2d Session (1948)*

§ 1. SHORT TITLE.

§ 2. NECESSITY FOR LEGISLATION.

§ 3. DEFINITIONS. For the purposes of this Act—

... (3) The term "communist political organization" means any organization in the United States having some, but not necessarily all, of the ordinary and usual characteristics of a political party, with respect to which, having regard to some or all of the following considerations:

(A) the extent and nature of its activities, including the expression of views and policies,

(B) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies, of the foreign governmental or political organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world communist movement referred to in section 2 of this Act,

(C) the extent to which its views and policies are the same as those of such foreign government or foreign organization,

(D) the extent to which it supports or advocates the basic principles and tactics of communism as expounded by Marx and Lenin,

(E) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization,

(F) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world communist movement,

(G) the extent to which it reports to such foreign government or foreign organization or to its representatives,

(H) the extent to which its members or leaders are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives,

(I) the extent to which (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis, and

(J) the extent to which its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization,

it is reasonable to conclude (i) that it is under the control of such foreign government or foreign governmental or political organization, or (ii) that it is one of the principal instrumentalities utilized by the world communist movement in carrying out its objectives.

(4) The term "communist-front organization" means any organization in the United States (other than a communist political organization and other than an organization having substantially all the ordinary and usual characteristics of a political party) with respect to which, having regard to some or all of the following considerations:

(A) the identity of the persons who are active in its management, direction, or supervision, whether or not holding office therein,

(B) the sources from which an important part of its support, financial or otherwise, is derived,

(C) the use made by it of its funds, resources, or personnel, and

(D) the position taken or advanced by it from time to time on matters of policy,

it is reasonable to conclude (i) that it is under the control of a communist political organization, or (ii) that it is primarily operated for the purpose of giving aid and support to a communist political organization, a communist foreign government, or the world communist movement referred to in section 2, or (iii) that its views and policies are in general adopted and advanced because such views or policies are those of a communist political organization, a communist foreign government, or such world communist movement.

(5) The term "communist organization" means a communist political organization or a communist-front organization.

(6) The term "publication" means any circular, newspaper, periodical, pamphlet, book, letter, postcard, leaflet, or other publication. . . .

(9) The term "final order of the Attorney General" means an order issued by the Attorney General under section 13 of this Act, which has become final as provided in section 14 of this Act, requiring an organization to register under section 8 of this Act as a communist political organization or a communist-front organization.

§ 4. CERTAIN PROHIBITED ACTS. (a) It shall be unlawful for any person—

(1) To attempt in any manner to establish in the United States a totalitarian dictatorship the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual;

(2) To perform or attempt to perform any act with intent to facilitate or aid in bringing about the establishment in the United States of such a totalitarian dictatorship;

(3) Actively to participate in the management, direction, or supervision of any movement to establish in the United States such a totalitarian dictatorship;

(4) Actively to participate in the management, direction, or supervision of any movement to facilitate or aid in bringing about the establishment in the United States of such a totalitarian dictatorship;

(5) to conspire to do anything made unlawful by this subsection.

(b) Any person who violates any of the provisions of subsection (a) of this section shall, upon conviction thereof, be punished by a fine of not more than \$10,000 or imprisonment for not more than 10 years, or both such fine and imprisonment.

(c) Any offense punishable under this section may be prosecuted at any time without regard to any statute of limitations.

§ 5. LOSS OF UNITED STATES CITIZENSHIP. (a) Section 401 of the Nationality Act of 1940, as amended, is hereby amended by striking out the period at the end thereof and inserting in lieu thereof a semicolon and the word "or", and by adding at the end of such section a new subsection to read as follows:

"(k) Committing any violation of section 4 of the Subversive Activities Control Act, 1948, provided he is convicted thereof by a court of competent jurisdiction."

(b) Section 403 (a) of the Nationality Act of 1940, as amended, is hereby amended to read as follows:

"(a) Except as provided in subsection (g), (h), (i), or (k) of section 401, no national can expatriate himself, or be expatriated, under such section while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in such section if and when the national thereafter takes up a residence abroad."

§ 6. EMPLOYMENT OF MEMBERS OF COMMUNIST POLITICAL ORGANIZATIONS. (a) It shall be unlawful for any member of a communist political organization, knowing or believing, or having reasonable grounds for knowing or believing, that the organization is a communist political organization—

(1) to seek or accept any office or employment under the United States without revealing that he is a member of such organization; or

(2) after thirty days after the date of the enactment of this Act, to hold any non-elective office or employment under the United States.

(b) It shall be unlawful for any officer or employee of the United States to appoint or employ any individual as an officer or employee of the United States, knowing or believing that such individual is a member of a communist political organization.

§ 7. DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST POLITICAL ORGANIZATIONS.

(a) It shall be unlawful for any member of a communist political organization, knowing or believing, or having reasonable grounds for knowing or believing, that the organization is a communist political organization—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) after sixty days after the date of the enactment of this Act, to use or attempt to use a passport theretofore issued.

(b) It shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or believing that such individual is a member of a communist political organization.

§ 8. REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS. (a) Each communist political organization (including any organization required, by a final order of the Attorney General, to register as a communist political organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a communist political organization.

(b) Each communist-front organization (including any organization required, by a final order of the Attorney General, to register as a communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a communist political organization or a communist-front organization on the date of the enactment of this Act, within thirty days after such date;

(2) in the case of an organization becoming a communist political organization or a communist-front organization after the date of the enactment of this Act, within thirty days after such organization becomes a communist political organization or a communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Attorney General is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization.

(2) The name and last-known address of each individual who is at the time of the filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months preceding the filing of such statement.

(4) In the case of a communist political organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe—

(1) accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization; and

(2) accurate records and accounts of moneys received and expended (including the sources from which received and the purposes for which expended) by such organization.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as a member of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

§ 9. KEEPING OF REGISTER: PUBLIC INSPECTION: REPORTS TO PRESIDENT AND CONGRESS.

§ 10. MEMBERSHIP IN CERTAIN COMMUNIST POLITICAL ORGANIZATIONS. It shall be

unlawful for any individual to become or remain a member of a communist political organization, knowing or believing, or having reasonable grounds for knowing or believing, that it is a communist political organization, if (1) such organization is not registered pursuant to section 8, and (2) the period of time designated in section 8 for registration by such organization has expired.

§ 11. USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE. It shall be unlawful for any organization which is registered under section 8, or for any organization with respect to which there is in effect a final order of the Attorney General requiring it to register under section 8, or for any person acting for or on behalf of such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name of the organization appearing in lieu of the blank: "Disseminated by \_\_\_\_\_, a communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by \_\_\_\_\_, a communist organization."

§ 12. DENIAL OF TAX DEDUCTIONS AND EXEMPTION. (a) Notwithstanding any other provision of law, no deduction for Federal income tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 8, or (2) there is in effect a final order of the Attorney General requiring such organization to register under section 8.

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 8, or (2) there is in effect a final order of the Attorney General requiring such organization to register under section 8.

§ 13. CERTAIN ADMINISTRATIVE DETERMINATIONS. [Procedure to be followed by the Attorney General in investigating and determining whether an organization is in fact a communist political organization or a communist-front organization.]

§ 14. JUDICIAL REVIEW. [Procedure for obtaining court review of the Attorney General's determination that an organization is a communist political organization or a communist-front organization.]

§ 15. PENALTIES. (a) Any person failing to register or to file any registration statement or annual report as required by section 8 of this Act shall, upon conviction thereof, be punished by a fine of not less than \$2,000 and not more than \$5,000; except that in case such failure is on the part of the executive officer (or individual performing the ordinary and usual duties of an executive officer) or secretary (or individual performing the ordinary and usual duties of a secretary), or any other officer, of an organization required to register under such section 8, the punishment for such failure shall be a fine of not less than \$2,000 and not more than \$5,000, or imprisonment for not less than two years and not more than five years, or both such fine and imprisonment. For the purposes of this subsection, if there is in effect with respect to an organization a final order of the Attorney General requiring it to register under section 8, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Whoever, in a registration statement or annual report filed under section 8 of this Act, willfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall, upon conviction thereof, be punished by a fine of not less than \$2,000 and not more than \$5,000, or by imprisonment for not less than two years and not more than five years, or by both such fine and imprisonment.

(c) Any person violating any provision of this Act for violation of which no penalty is provided by section 4 or by subsection (a) or (b) of this section shall, upon conviction thereof, be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or by both such fine and imprisonment.

§ 16. SEPARABILITY OF PROVISIONS. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remaining provisions of this Act, or the application of such provision to other persons or circumstances, shall not be affected thereby.